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RECOGNITION OF INSURGENTS AS A *DE FACTO* GOVERNMENT

I

THE Spanish Civil War of 1936–1939 gave occasion for a series of important decisions of English Courts on matters of interest for international law.[1] These decisions were given at a period when breaches of international law on a wide scale were being committed by some States and tolerated by others in what was assumed to be the general interest of peace. Settlement of current disputes by reference to international law had receded into the background. It thus happened that the part of municipal tribunals in scrupulously upholding the principles of international law, in so far as they were applicable, acquired particular significance. The task with which they were confronted was rendered specially difficult owing to a wide discrepancy which the nature of events established in many respects between the conspicuous facts of the civil war and the international legal situation. In the first instance, while there were present most of the requirements imposing upon third States the duty to recognise a status of belligerency, Great Britain and other countries were prevented from granting belligerent rights owing to the circumstance that the struggle had ceased from its

[1] See in particular *The Cristina*, [1938] A.C. 485; [1938] 1 All E.R. 719; *Banco de Bilbao* v. *Rey*, [1938] 2 K.B. 176; [1938] 2 All E.R. 253; and *The Arantzazu Mendi*, discussed below. For a discussion of some aspects of these cases see Jennings in *Modern Law Review*, ii (1939), pp. 287–291.

very commencement to be a civil war in the established sense of the term. The result was that the rebellious forces, while denied the exercise of belligerent rights on the high seas, were in other respects treated as a community engaged in lawful warfare. They acquired the status of insurgency and in that capacity their freedom of action was given a wide and generous interpretation. Secondly, until February, 1939, the insurgent authorities, although exercising effective authority over the major part of Spanish territory, were not recognised as a government for the reason that to do so would have amounted to premature recognition in breach of international law. Yet the fact of the actual exercise of power could not properly be ignored. The result, fully authorised by international law, was a measure of *de facto* recognition of substantial scope.

Thus in both matters—recognition of belligerency and recognition as a government—there was created a position in which Great Britain, acting in conformity with international law, found herself compelled to disregard what some conceived to be the realities of the situation and to adopt the intermediate legal institutions of recognition of insurgency (as distinguished from recognition of belligerency) and of *de facto* recognition. Neither of these had previously acquired any degree of precision. It is probable that, designed as they are to meet factual situations which, for one reason or another, cannot be defined in the typical terms of recognition of belligerency and *de jure* recognition of a government, neither of these institutions admits of precision or finality. This being so, it is of considerable jurisprudential interest to examine the attitude of English Courts on these matters at a time when the realities of the law were confronted with actualities which defiantly challenged its authority. It is proposed to examine these questions by reference to what is perhaps the most significant case decided by English Courts during the Spanish Civil War, namely, *The Arantzazu Mendi*[2]—a case which raises questions of significance not only as to recognition of insurgents as a government but also as to certain important aspects of the judicial function in the matter of interpretation of international law.

The Arantzazu Mendi was registered at Bilbao. She had left Spain before May, 1937. In June, 1937, Bilbao was captured by the insurgent forces. On 23rd March, 1938, the owners of the ship were served in London with a notice of requisition on the

[2] [1938] 3 All E.R. 333 (Judgment of Mr. Justice Bucknill); [1938] 4 All E.R. 267 (Judgment of the Court of Appeal: Slesser, Finlay and Goddard, L.JJ.); [1939] 1 All E.R. 719 (Judgment of the House of Lords: Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright).

part of the Republican Government under a decree of requisition of 28th June, 1937; on 5th April, 1938, the accredited sub-agent of the insurgent Nationalist Government in London served on the owners a notice of requisition under a decree issued on 2nd March, 1938. On 13th April the managing director of the owners' firm declared that he freely submitted to the provisions of the Nationalist decree of 2nd March. On the same day the Republican Government issued a writ asking for possession of the ship to be adjudged to them. The Nationalist Government appeared conditionally under protest and moved that the writ be set aside on the ground that it impleaded a foreign State, namely, the Nationalist State which was in possession of the ship by its duly authorised agents. Mr. Justice Bucknill in an interim judgment held that the Nationalist Government was in possession of the ship. On the question whether that Government was the government of a foreign sovereign State his Lordship sought the usual information in a letter of the Foreign Office. The answer received was as follows—

> "(1) His Majesty's Government recognises Spain as a foreign sovereign state. (2) His Majesty's Government recognises the government of the Spanish Republic now having its seat in Barcelona as the *de jure* government of Spain. (3) No government other than that referred to in the preceding subparagraph is recognised by His Majesty's Government as the *de jure* government of Spain or any part thereof. (4) The Nationalist Government of Spain is a government in conflict with the government of the Spanish Republic established at Barcelona. It claims to be the government of Spain and is seeking to overthrow the government of the Spanish Republic and to establish its authority over the whole of Spain. (5) His Majesty's Government recognises the Nationalist Government as a government which at present exercises *de facto* administrative control over all the Basque provinces of Spain. (7) His Majesty's Government has not accorded any other recognition to the Nationalist Government. (8) The Nationalist Government is not a government subordinate to any other government in Spain."

In reliance upon this letter Mr. Justice Bucknill held[3] that the Nationalist Government was for the purposes of this case a government of a foreign sovereign State and that the writ must be set aside seeing that it tended to implead the government of a foreign sovereign State. The Court of Appeal unanimously upheld the decision of the trial judge on both points—that of

[3] [1938] 3 All E.R. 333.

the status of the Nationalist Government as the government of a foreign sovereign State and that of its being in possession of the ship. The House of Lords unanimously confirmed the decision of the Court of Appeal.

At the time of the judgment the Nationalist authority in Spain had not been recognised as a belligerent. It was an insurgent government. The condition of insurgency in international law is one of considerable elasticity. It is a factual relation in the meaning that legal rights and duties as between insurgents and third States exist only in so far as they are expressly conceded and agreed upon for reasons of convenience, of humanity, or of economic interests. Great Britain had maintained official intercourse with the Nationalist authorities for the protection of British subjects, for safeguarding commercial interests, and for securing a relaxation of severity in the conduct of war by appeals of various kinds and offers of good offices in the exchange of prisoners and in similar matters. Agents had been mutually appointed for these purposes. They had been granted certain privileges calculated to facilitate the execution of their duties, but were denied the diplomatic immunities enjoyed by representatives of sovereign States.[4] At the time when these arrangements were made the British Government repeatedly denied that there was an intention to recognise the sovereignty of the insurgent authority.[5] The position had not changed at the time

[4] Answering a question in the House of Commons on April 4, 1938, concerning a letter sent to a local authority and referring to the "Spanish Nationalist Government," the Under-Secretary of State for Foreign Affairs said:

> "The use of the phrase 'Spanish Nationalist Government' in this letter, which was in fact only of a semi-official character, implies no sort of modification of the attitude of his Majesty's Government in regard to the recognition of General Franco's administration. Under the agreement made with the latter for the exchange of agents, diplomatic status was not to be claimed for them, and no such claim has in fact been made or conceded by either party to the agreement. It was, however, felt desirable to secure for the British Agent and his staff certain privileges of a kind which are commonly enjoyed by diplomatic officials in order to facilitate the discharge of their duties. It was thus found necessary to concede corresponding privileges such as the one in question to General Franco's Agent and his staff. Such concessions made by either side involve no admission that the recipients possess diplomatic status, in proof of which it should be sufficient to say that certain reliefs which could be granted only on the basis of such status are withheld from the Duke of Alba and his staff, and the privileges accorded to them are of a limited character": House of Commons Debates, vol. 334, col. 5.

[5] On 8th November, 1937, the Secretary of State for Foreign Affairs stated that "the reception of such an agent in London will not in any way constitute recognition by His Majesty's Government of the authorities of the territories under the control of General Franco, . . ." He added that "neither party will accord or expect to receive diplomatic status for their agents" (House of Commons, vol. 328, cols. 1125, 1126). On 22nd November, the attention of the Secretary of State for Foreign Affairs was called to an official communique issued by General Franco's headquarters claiming that the conclusion of the agreement concerning agents implied recognition of the sovereignty of the Franco administration. In reply the Secretary of State for Foreign Affairs stated that he was

when the judgment of the Court of Appeal was given. This being so, the decisions of the Court of Appeal and of the House of Lords laying down that the insurgent government was the government of a foreign sovereign State seem to go so far beyond the declared intentions of the British Government as well as beyond what international lawyers associate with a status of insurgency or with recognition of a government during a civil war that, but for the information received from the Foreign Office, it might have been difficult to follow the judgments in question. Actually, they did not purport to go beyond an interpretation, in the light of established principles, of the communication from the Foreign Office. The question is whether the nature and degree of recognition as stated in the answer of the Foreign Office irresistibly led to the conclusion arrived at by the courts.

II

The principle that in questions relating to the status of foreign States and governments courts rely on the information received from the Executive is a well-established rule of judicial practice. But that principle does not relieve the courts of the substantial duty both of interpreting the answer of the Executive and of drawing from it the appropriate legal consequences. Thus on questions of recognition courts must, in the first instance, interpret the statement of the Executive in order to determine what degree of recognition has been granted. For on this point the communication may be—and often is—obscure or ambiguous. Moreover, once the task of interpretation has been accomplished, the courts are called upon to determine the legal consequences of such degree of recognition as may have been given. With regard to either, their function must be guided by the consideration that in matters involving the international relations of this country results must be avoided which are inconsistent with its international obligations. In particular, with regard to the communication from the Foreign Office it is incumbent upon courts, if only possible, to interpret it so as not to impute to the Crown the intention to disregard international law. This is a rule which is generally regarded as applicable to the interpretation of statutes.[6] It must be applied *a fortiori* to the interpretation of

"unable to find any phrase therein which might be interpreted as claiming that the agreement implies recognition of sovereignty." He then agreed that His Majesty's Government "do not accept any suggestion of that kind" (*ibid.*, vol. 329, col. 834).

[6] *Mortensen* v. *Peters*, [1906] Sc.L.T. 227. See also *Croft* v. *Dunphy* (1933), 1 D.L.R. 225; [1933] A.C. 156; Cockburn, C. J., in *Queen* v. *Keyn*, 7 Ex.D. 63, 210; Marshall, C.J., in *The Charming Betsey*, 2 Cr. 64, 118.

the pronouncements of a department of the Executive which is specially concerned with the international relations of this country. In *The Arantzazu Mendi* the answer of the Foreign Office did not pretend to constitute a clear exposition of the situation. But the Secretary of State was explicit on one point, namely, that His Majesty's Government had not accorded to the Nationalist Government any recognition other than that deducible from the terms of the letter—an expression of caution which would have had little meaning if recognition identical with that of a foreign sovereign State had been intended.

This being so, it is not inappropriate to enquire what was the kind of recognition which His Majesty's Government could not, consistently with their international obligations, have intended to grant. It is proper to ascertain what manner of recognition would be so inconsistent with international law as to impose upon the Court the duty to do its utmost in order to avoid the necessity of attributing to the Crown the will to set aside the applicable rules of international law. It would have been fitting to attempt to interpret the letter from the Foreign Office by enquiring what were the rules of international law in the matter of recognition of insurgent governments *durante bello*.

This particular question is not an unduly difficult one. For while some problems of recognition of States, governments, and belligerency are controversial—for instance, whether recognition is constitutive or declaratory or whether it is a diplomatic or a legal function—there are some which are readily and generally acknowledged. Thus it is universally admitted that in the case of a civil war or a war of secession it is contrary to international law to grant to the insurgent community full recognition as a government or a State. So long as the issue has not been definitely decided in favour of the rebellious party, recognition is premature and unlawful. As Hall says: "Until independence is so consummated that it may reasonably be expected to be permanent, insurgents remain legally subject to the state from which they are trying to separate. Premature recognition therefore is a wrong done to the parent state; in effect indeed it amounts to an act of intervention."[7] Sir William Harcourt in his *Letters by Historicus on Some Questions of International Law* (1863) put the matter even more clearly. He says—

> "While the issue can be still considered in any degree *in ambiguo*, the presumption is necessarily in favour of the former Sovereign. And a friendly State is bound to exact very conclusive and indisputable evidence that the sovereignty of a government with which it has existing relations over any part of its former dominions has been

[7] *International Law* (8th ed., 1924), s. 26, p. 105.

> finally and permanently divested. It is not at liberty during the pendency of an actual struggle to speculate on the result, or to assume the probability of the ultimate failure of the ancient Sovereign, however plausible may be the grounds for such an inference. What the claimant to recognition has to show is an accomplished and *de facto*, not a probable or *paulo post futurum*, independence. This I believe to be the accurate rule of international law, . . ."[8]

These quotations refer to the recognition of insurgents attempting a secession from the existing State, but the position is identical in the case of rebellions aiming at setting up an alternative government seeing that the recognition of the insurgents as a sovereign State results in the separation of the State in question into two units. There is, for instance, little doubt that if in the course of the American Civil War Great Britain had recognised without qualification the Confederate States as the government of the part of the United States under their control in such a manner as to oblige the courts to treat it as a foreign sovereign State, such recognition would legally have been a wrong committed against the lawful government and politically a cause for war with it.

Recognition pure and simple of the Spanish insurgent government as a government of Spain or even as a government of a part of Spain, at the time when these cases were decided, would not have been in conformity with an established principle of international law. It might conceivably have been open to the British Government to form the view that the established rule of international law was too rigid and that it was no longer possible to adhere to it in the unprecedented conditions of the Spanish Civil War, but nothing short of a very clearly expressed determination to effect a change of that nature could properly be regarded as sufficient. No such determination appeared in the letter of the Foreign Office in *The Arantzazu Mendi*. On the contrary, there was a clear expression of intention to grant a limited recognition only, as distinguished from full recognition *de jure*—"His Majesty's Government has not accorded any other recognition to the Nationalist Government." The recognition granted was to "a government which at present exercises *de facto* administrative control" over the larger portion of Spain. It did not partake of the formality of the *de facto* recognition such as, for instance, was accorded to Soviet Russia in 1921.[9] But assuming that the intention was to grant full "*de facto*" recognition, the question arises: Is such recognition indistinguishable

[8] P. 7. See also Moore, *Digest*, Vol. I (1906), p. 73. There is on this question practical unanimity among international lawyers.

[9] In the letter of the Foreign Office in *Luther* v. *Sagor* it was stated that "His Majesty's Government recognise the Soviet Government as the *de facto* Government of Russia."

in its legal results from full *de jure* recognition? If so, was the caveat in the statement of the Foreign Office without any ascertainable significance? If so, has the prohibition of premature recognition ceased to be a rule of international law?

III

The decision of the Court of Appeal in *Luther* v. *Sagor*[10]—a much overworked case—created among many, including writers of distinction, the impression that there is "a diplomatic distinction between recognition *de jure* and recognition *de facto*, but [that] there is no legal difference between these two forms."[11] Actually, the decision in that case went no further than to lay down that there is no difference between *de facto* and *de jure* recognition for the purpose of acknowledging the validity of the legislative or executive acts of the government recognised *de facto*. It was to that extent—and no further—that the Court of Appeal relied upon *Luther* v. *Sagor* in its decision in *Banco de Bilbao* v. *Rey*.[12] In that case the Court held that, in view of the *de facto* recognition of the insurgent authorities by the British Government, it was bound to treat as valid the decrees of the Spanish Nationalist authorities in the territory under their control while treating as a mere nullity the decrees of the Republican Government in respect of that territory. The communication of the Foreign Office in that case approximated closely to that in *The Arantzazu Mendi* except that it was stated in the crucial passage that "His Majesty's Government recognised the Government of General Franco as an *insurgent* Government exercising *de facto* control over a considerable portion of Spain." It may be a matter of dispute how far the qualification of the recognised authority as an "insurgent" Government was intended to reduce the import of the recognition; similarly, it may be a matter of discussion how far the principle of *Luther* v. *Sagor*, originally applied to an authority in unrivalled possession of the entire territory of the State, can be applied without modification to the case of an insurgent administration in the course of a civil war waged against a Government enjoying recognition *de jure*. But apart from the not unnecessary warning against using the decision in *Luther* v. *Sagor* as covering all possible aspects of *de facto* recognition,[13] there are weighty reasons of convenience and common sense which render acceptable the true principle of

[10] [1921] 3 K.B. 532.
[11] Brierly, *The Law of Nations* (2nd ed., 1935), p. 110.
[12] [1938] 2 K.B. 176; [1938] 2 All E.R. 253.
[13] See below, p. 19, as to *The Gagara*.

Luther v. *Sagor* as followed in *Banco de Bilbao* v. *Rey*—the principle, that is to say, that recognition *de facto* carries with it the acknowledgment of the validity of the acts of the recognised authority within its territory. It is not inconsistent with the legitimate interests of the lawful Government that third States should be in a position to maintain some intercourse with the insurgent administration without treating the insurgents as a sovereign State in the international arena. Recognition *de facto* serves that very purpose. A rule of law which compels third States to regard as invalid, for a prolonged period of time, the laws and administration of a *de facto* authority and to regard as valid within the territory of that authority the laws and administration of the *de jure* government, is not one which commends itself to sound principle (unless, perhaps, in a particular case the *de facto* authority is established in violation not only of the constitutional law of the State concerned but also of international law[14]). A State cannot be called upon to disregard persistently facts which are not in themselves contrary to the law. Revolutions and rebellions are not contrary to international law. For this reason the rule of international law prohibiting premature recognition of governments pending the civil struggle applies only to recognition *de jure*, but not to recognition *de facto* as interpreted in *Banco de Bilbao* v. *Rey*. This means that international law permits such a measure of recognition as is necessary for the acknowledgment of the validity of the acts of the *de facto* authority within its territory. But the permission does not go to the length of denying its own premises by making recognition *de facto* extend to all purposes, i.e. by assimilating it to full recognition *de jure*. It does not go to the length of permitting the treatment of the *de facto* authority as a foreign sovereign State for all purposes.

The circumstance that international law permits recognition *de facto* but not *de jure* means that there is a substantial difference between these two kinds of recognition; it means that recognition *de facto* goes so far and no farther. But a hasty reading of *Luther* v. *Sagor* is apt to conduce to the facile generalisation that the

[14] This latter consideration might conceivably have been adduced as justifying any criticism of the decision in *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* ([1937] Ch. 513). In that case the principle of *Luther* v. *Sagor* was applied to the internal effects of a decree of the Italian *de facto* Government, recognised as such by His Majesty's Government, putting into liquidation the Bank of Ethiopia. It might have been argued that as the *de facto* recognition was accomplished in violation of international law courts could not attach to it any legal effects whatsoever. Probably the accurate answer to that line of reasoning is that the grant of *de facto* recognition—a function which is within the province of the Government and not of the courts—validated the effects of the illegal act to the extent covered by the *de facto* recognition.

distinction between these two kinds of recognition is a mere formality so far as the Courts are concerned. This seems to have been the view of the learned judge in *Bank of Ethiopia* v. *Bank of Egypt*, who said in a passage which, it is submitted, was unnecessary for the decision:

> "The recognition of the fugitive Emperor as a *de jure* Monarch, appears to me to mean nothing but this, that while the recognised *de facto* Government must for all purposes, while continuing to occupy its *de facto* position, be treated as a duly recognised foreign Sovereign State, His Majesty's Government recognises that the *de jure* Monarch has some right (not in fact at the moment enforceable) to reclaim the Governmental control of which he has in fact been deprived. Where, however, His Majesty's Government has recognised a *de facto* Government, there is, as it appears to me, no ground for suggesting that the *de jure* Monarch's theoretical rights (for *ex-hypothesi* he has no practical power of enforcing them) can be taken into account in any way in any of His Majesty's Courts."

It would have been sufficient for the purposes of the case to hold that as the British Government regarded the Italian Government as the government *de facto* of the parts of Ethiopia which they controlled the Court was bound, on the analogy of *Luther* v. *Sagor*, to recognise as valid the decree of the Italian authority placing the Bank of Ethiopia in liquidation. But there was no warrant for suggesting that the *de facto* authority was to be treated for *all* purposes as a duly recognised foreign sovereign State. In fact, in the Foreign Office certificate which was laid before the Court in that case it was stated that an Envoy Extraordinary and Minister Plenipotentiary for the Emperor of Ethiopia had been received at the Court of St. James and that he continued to be accorded recognition in that capacity.

Neither was the *dictum* of Mr. Justice Clauson acceptable in so far as it suggested that the *de jure* sovereign had as such no rights enforceable before English Courts. In a case decided a year later, *Haile Selassie* v. *Cable and Wireless Company Limited* (No. 2), it was expressly held that the continued recognition *de jure* of the Emperor of Abyssinia had decisive consequences for the enforcement of the property rights of the Emperor outside Abyssinia. The Court refused to consider as applicable the principle laid down in *United States of America* v. *McRae*[15] that a successful government succeeds to the property of the defeated government. The Court pointed out that in *United States of America* v. *McRae* the question of rival claims of a *de jure* and a *de facto* government was not at issue—a timely reminder that continued *de jure* recognition is not a meaningless fiction. Similarly, the Court refused to follow the easy path of accepting

[15] (1869) L.R. 8 Eq. 69.

the authority of *Luther* v. *Sagor* as covering the point. Mr. Justice Bennett said—

> "I think that the only point established by the decision in that case is that, when the Government of this country has recognised that some foreign Government is *de facto* governing some foreign territory, the law of England will regard the acts of the *de facto* Government in that territory as valid and treat them with all the respect due to the acts of a duly recognised sovereign State. It is clear, I think, that the acts so treated are acts in relation to persons or property in the territory which the authority is recognised as governing in part."[16]

The learned judge attempted, not without some difficulty, to explain the wide statement, quoted above, in Mr. Justice Clauson's judgment in *Bank of Ethiopia* v. *Bank of Egypt*. He suggested that Mr. Justice Clauson was merely concerned to demonstrate that as the plaintiff had no governmental control of any kind in Ethiopia he had no means of enforcing control *there*. Mr. Justice Bennett then referred to *Banco de Bilbao* v. *Rey* as an authority for the limited proposition that recognition *de facto* has legal consequences only with regard to property and acts within the territory under the control of the *de facto* authority. Having thus set a limit to the seemingly uncontrollable influence of *Luther* v. *Sagor*[17] Mr. Justice Bennett held that in view of the continued recognition *de jure* of the Emperor of Ethiopia the plaintiff was entitled to recover a debt which had accrued to him in his capacity as Emperor of Ethiopia before his country had been occupied by the Italian troops. The juridical consequences of the distinction between *de jure* and *de facto* recognition were thus clearly asserted. The relation between the claim of the plaintiff and his continued recognition *de jure* was demonstrated several months later when the case came before the Court of Appeal which, in view of the impending recognition *de jure*, stayed the proceedings until a date after the probable date of recognition in order to prevent unnecessary recourse to judicial process. Subsequently, after recognition *de jure* had been granted in due course and certified in a communication from the Foreign Office, the Court of Appeal held that, in view of that recognition, the situation which obtained at the time when the appeal had been lodged was changed, and that the King of Italy, as the Emperor of Ethiopia, was entitled to the sums claimed by the plaintiff.[18]

[16] (1938) 54 *T.L.R.*, 1087, 1089.

[17] In the first phase of *Haile Selassie* v. *Cable and Wireless Co.* the Court of Appeal (54 T.L.R. 996) reversed the order of Mr. Justice Bennett (54 T.L.R., 628) who, relying, *inter alia*, on *Luther* v. *Sagor*, stayed the proceedings in this case on the ground that the Italian Government made a claim to the sum in question.

[18] [1939] 1 Ch. 182.

In *The Arantzazu Mendi* the trial judge and the Court of Appeal once more reverted to *Luther* v. *Sagor* as a source of judicial inspiration. They held that an insurgent government recognised as a *de facto* authority was entitled to jurisdictional immunity in England in respect of property situated in England not only in general but also as against the rival claim of the lawful government which His Majesty continued to recognise *de jure*. No reference was made, on this matter, to Mr. Justice Bennett's judgment in the case referred to above. The Court of Appeal in *The Arantzazu Mendi* was, of course, free to overrule the decision in *Haile Selassie* v. *Cable and Wireless Co.* (No. 2), but it may perhaps be doubted whether the proper course was to disregard that decision altogether. The decision in *The Arantzazu Mendi* raises issues wider than the matter which was immediately before the Court and it is therefore permissible to scrutinise it in some detail. In none of the judgments was there an attempt to solve a problem which, on the face of it, was one pertaining to the international relations of the Crown, from the point of view of the question whether the measure of recognition as assumed by the Court was in accordance with international law and, if it was not, whether it was unavoidable to impute to His Majesty the intention of committing an international wrong by recognising the Nationalist authority as a foreign sovereign State. It would not have been improper to discuss the question whether, if there had been the intention on the part of the Government to grant wide and full recognition as assumed by the Court, it was necessary for the Foreign Office to insist on the *de facto* character of the recognition or on the circumstance that no other recognition than that referred to in the letter of the Foreign Office had been granted.

Undoubtedly, the Court attempted to explain why it was deemed necessary to extend the principle of *Luther* v. *Sagor* to cover the position of the *de facto* authority abroad. However, it is respectfully submitted, the attempt did not go far enough. Thus Slesser, L.J., discussed the suggestion that the principle enunciated in *Luther* v. *Sagor* was limited to the validity of the acts of the *de facto government within its territory*, but he confined himself to quoting extracts from *Luther* v. *Sagor* asserting that the government *de facto* is one which is actually in possession of power while a government *de jure* is one which ought (apparently in law) to possess it. For clearly, it is possible that in the view of the recognising power there follow *some* legal consequences from the fact that the *de jure* government *ought* to possess authority. Otherwise the insistence on the part of the recognising State

on the difference between the two kinds of recognition would be meaningless. In the eyes of international law recognition *de facto* may *for some purposes* be tantamount to recognition *de jure*, but this does not mean that it is so for *all* purposes.[19]

The substantial difference between the recognition of the Soviet Government in *Luther* v. *Sagor* and the recognition of the Nationalist Government in *The Arantzazu Mendi* was not that in the former case the whole territory of Russia was under the control of the recognised authority while this was not so in the case of Spain. The essential distinction was that in the case of the Soviet Government of Russia a measure of recognition which would have amounted to full recognition obliterating the difference between the *de jure* and the *de facto* variety would not have been inconsistent with international law seeing that the civil war was then at an end (the circumstance that the whole Russian territory was under the sway of the Soviet Government was, from this point of view, not immaterial in the sense that it was evidence of the fact that the *de jure* authority had actually ceased to exist). On the other hand, in the case of Spain the *de jure* authority was still a *de facto* power over a considerable portion of Spain, the civil war was raging, and a full measure of recognition assimilating in effect *de facto* and *de jure* recognition would have constituted premature recognition and as such be contrary to international law.

The learned Lord Justice had no hesitation in holding that the recognition of an authority as a *de facto* government pointing to an orderly and organised constitution was a recognition that the authority thus recognised possessed the powers of a State. But it is elementary that there are governments which are not governments of a State in the meaning of international law. There are international conventions which have been signed and ratified by more than a hundred "governments"; but only a portion of these are governments of sovereign States in the meaning attached to the term by international law. The fact that an authority does "possess the powers of a State" does not mean that it is a State in international law with the full prerogatives of statehood attaching to it. It may mean that it possesses sufficient power to make it incumbent upon Courts to

[19] Probably, for this reason the question of recognition of belligerency on which the appellants relied and which was discussed at some length by Slesser, L.J., was not entirely germane to the issue. Even if recognition of belligerency had been granted, such recognition would have amounted to a solemn admission of the fact that a civil war with all its precariousness and uncertainty was raging in Spain—a condition of affairs in which recognition of the insurgent government as the sovereign government of a part of Spain with all the implications of sovereign statehood in international law would constitute a clear departure from the established rules of international law in the matter of premature recognition.

recognise the internal validity of its laws and decrees. There is no potency in the words "government"[20] or "recognition" irrespective of the context in which they are used or of conditions to which they refer.[21] The term "*de facto* government" is often used in international law with reference to a temporarily successful local authority which has risen in opposition to the general government. When English Courts in a number of cases arising out of the American civil war referred to the government of the Confederate States as a "*de facto*" government, they did not intend to refer to it as the government of a sovereign State.[22]

The continued recognition *de jure* of the Republican Government of Spain did not, as rightly pointed out by Lord Justice Goddard, make impossible the recognition of the Nationalist authority as a *de facto* government over a part of Spain. But the question still remained whether such recognition amounted to recognition as a foreign sovereign State, with the full consequences of statehood in international law. There is a difference between saying, as the Foreign Office did, that the Nationalist Government is *de facto* not a government subordinate to any other government in Spain and saying, as the learned Lord Justice did, that the "Nationalist Government had absolute independence of any superior authority." In so far, therefore, as Goddard, L.J., based his judgment on the view that "we are bound by authority to hold that *for all purposes*[23] the consequences [of *de facto* recognition] are the same as they would be if the government were a *de jure* government," it is submitted that probably there is no

[20] Earl Russell, writing to Mr. Adams, Minister of the United States, on 26th November, 1861—at a time when Great Britain refused to recognise the Confederacy as a government of a State—was referring to it throughout as a *de facto* Government. He said: "Her Majesty's Government hold it to be an undoubted principle of international law, that when the persons or the property of the subjects or citizens of a state are injured by a *de facto* government, the state so aggrieved has a right to claim from the *de facto* government redress and reparation" (Moore, *Digest*, vol. I, p. 209).

[21] In *The Charkieh* (4 Adm. & Eccl. 59) the certificate of the Foreign Office affirmed that "he [the Khedive] is recognised by Her Majesty's Government as the hereditary ruler of the province of Egypt under the supremacy of the Sultan of Turkey," but the same certificate stated that "the Khedive has not been and is not now recognised by Her Majesty as reigning sovereign of the state of Egypt." Probably recognition as a hereditary ruler of the province would have been sufficient for acknowledging the validity of the legislative acts done under the authority of the Khedive, while the absence of recognition as a sovereign was deemed a good reason for not granting him immunity from jurisdiction.

[22] Thus we find the Vice-Chancellor saying in *United States* v. *Prioleau* (1865), L.J.Ch. 7: "If the case had been that of a body of mere robbers devastating and plundering the territories of the United States, our courts might have interfered to restore property so acquired; but then the rightful claimants would have been not the United States Government, but the persons who had been robbed. It is only because the money was raised by a *de facto* Government that the United States can come here to claim at all. Had the money been obtained by mere robbery it would have never become public property. It only acquired that character because it was levied by an authority exercising rights of Government."

[23] Italics are the writer's.

authority for any such view. The available authority is to the effect that recognition *de facto* of a revolutionary government has reference only to the internal acts of that government within the territory under its control.

IV

Lord Atkin's judgment in the House of Lords, while fully endorsing the decisions of the Courts below, included a significant modification of Lord Justice Goddard's view of the full identity of *de jure* and *de facto* recognition. He said: "There is ample authority for the proposition that there is no difference for *the present purposes*[23] between a recognition of a state *de facto* as opposed to recognition *de jure*."[24] But otherwise, in addition to holding that the letter of the Foreign Office amounted, for the purposes of international law, to a recognition of the Spanish insurgents as a foreign sovereign State, Lord Atkin did not discuss the issue involved apart from holding that there existed in the present case "all the reasons for immunity which are the basis of the doctrine in international law as incorporated into our law," [25] and that "the non-belligerent state which recognizes two governments, one *de jure* and one *de facto*, will not allow them to transfer their quarrels to the area of the jurisdiction of its municipal courts."[26] Neither did other learned Lords embark upon an analysis of the question with the exception of a short passage in Lord Wright's concurring judgment in which he expressed the view that the "Foreign Office stated the precise facts as then existing in regard to the recognition of His Majesty's Government" and that the contents of the statement of the Foreign Office were not "open to be discussed by the Court on grounds of law."[27]

The judgment of the House of Lords was given at a time when the overwhelming realities of the political and strategic situation would have imparted to a decision denying the full international sovereignty of the insurgent government an appearance of unreality, but it is submitted that an artificiality of this nature may on occasions be of the very essence of the law. In any case, seeing that the judgments were delivered by judges who on former occasions enriched the not insignificant contribution of English Courts to the common stock of international law, a thorough examination by the highest tribunal of the difficult questions involved would have been most welcome. Undoubtedly,

[24] Italics are the writer's. 4 All E.R. 719, at p. 722.
[25] See below, p. 18.
[26] 4 All E.R. 719, at p. 722. And see below, p. 17.
[27] At p. 724.

when the statement of the Foreign Office is clear, it must not be discussed or questioned on legal grounds, but it may be doubted whether in the present case the statement was sufficiently clear or "precise" so as to render unnecessary its interpretation by reference to principles of international law. It was certainly not a communication which suggested at once and with irresistible force that recognition of the government of a sovereign State had been granted.

While in some matters there is no distinction, in the eyes of the Courts, between mere *de facto* and full *de jure* recognition, there exists such a distinction for some purposes. Recognition *de facto* means, *inter alia*, that Courts are bound to treat as lawful the internal acts of the insurgent authority within its territory; it does not mean that that authority must be treated in every other respect like a sovereign State. Thus, as mentioned,[28] the British Government had refused to entertain regular diplomatic relations with the Spanish insurgents or to grant the usual diplomatic immunities to their agents. The *de facto* insurgent government cannot be treated for all purposes as a foreign sovereign State. Once it is so treated the distinction between *de facto* and *de jure* recognition—a distinction to which clearly the Government attached importance and which is of considerable usefulness in international relations—is obliterated; the *de facto* recognition is treated like recognition pure and simple.

There are no impregnable reasons *ab inconvenienti* militating against the view denying to a *de facto* insurgent government the ordinary jurisdictional immunities to which the *de jure* government is entitled. This undoubtedly places the latter in a favoured position in comparison with the former. But the advantage is hardly as far-reaching as may appear at first sight. It is certainly not an advantage which may have the result of interfering appreciably with the maintenance of an attitude of impartiality in relation to a civil war. The denial of the privilege of jurisdictional immunity does not mean the denial of the substantive rights of the government concerned. If that government is in possession of the subject-matter of the action—and *The Arantzazu Mendi* and other authorities show that very nominal possession may on occasions be sufficient—then it is in a position to proceed to prove such title as it possesses, and the mere claim of the *de jure* government will not be regarded as depriving it of that right. It may or may not have difficulty in establishing its title. It may attempt to show, not without considerable prospect of success, that the decrees of the *de jure* government requisitioning

[28] See above, p. 4.

ships registered in territory occupied by the *de facto* government are invalid in the eyes of foreign courts. In case of rival requisition decrees relating to ships in foreign waters the difficult questions may have to be faced as to the relevance of the place of registration and as to the extraterritorial effect of decrees. It may be possible in such cases to avoid the necessity of solving a thorny problem by relying on the fact of actual or constructive possession and of conferring immunity on the government which happens to be in such possession. This is a solution which may recommend itself because of its simplicity. But it is not one which, in the case of the *de facto* government—especially in a claim against the *de jure* government—can be resorted to consistently with the applicable rules of international law.

A solution of this nature, shifting, as it does, the determination of the rights of the parties from a legal basis to the accidents of possession, may lead to strange and unexpected results. The rival governmental claims over the ship may be made dependent on the attitude of the owners or the master or the crew or on the results of a physical contest between them.[29] It may be embarrassing for the courts of a third State to decide quarrels between a *de jure* and a *de facto* government, but if the necessity for such a decision arises it is preferable that it should be made with the help of substantive rules of law rather than by reference to the accidents of possession as determined by the changing attitudes of the owners of the ship, of the master, or of the crew. In *The Arantzazu Mendi* the owners and master declared themselves to hold the ship on behalf of and at the order of the Nationalist Government. This fact, in the view of the Court of Appeal,

[29] This was exactly what happened in *The Abodi Mendi* (reported in *The Times* newspaper, 10th December, 1938) where the master—who, apparently, favoured the Nationalist cause—after having left the ship for a walk, found that the crew had removed the gangway and had since then prevented him from returning on board. The Republican authorities then appointed a new captain who held the ship at their disposal. In view of this the Republican Government now moved that the warrant of arrest, under which the ship had been as the result of a writ previously issued by them, should be set aside, while the owners, assisted by the Nationalist Government, asked that the master be reinstated. The President ordered the summons to stand over pending the appeal to the House of Lords in *The Arantzazu Mendi* on the question of the status of the Nationalist Government. He thought that the plaintiffs should not be allowed to obtain possession of the vessel in the way described above. It will be noted that in *The Cristina* (1938), 54 T.L.R. 512, Lord Wright thought that it was "unnecessary to consider by what mode the respondents obtained possession" (at p. 518). Lord Maugham said: "It seems to me that the claim by the Spanish Government for immunity from any form of process in this country may extend to cases where possession of ships or other chattels had been seized in this country without any shadow of right" (at p. 521). But see the judgment of the Supreme Court of the United States, delivered on 31st January, 1938, by Mr. Justice Stone in *Compañia Española de Navegacion Maritima* v. *The Navemar*, 58 *Supreme Court Reports*, 432, where possession acquired as the result of the forcible seizure of the ship by the crew was not deemed sufficient to found a claim for immunity.

determined the issue. What would be the position if the master or the owners subsequent to a final decision of the Court were to change their allegiance and proceed to hand over the ship to the Republican Government? What would be the position if the master of a ship which is rightly in the possession of the Republic Government were to offer her to the Nationalist Government? What is the legal situation if the Ambassador representing the lawful Government decides to change his allegiance and, after having declared in favour of the insurgent Government, hands over to that Government the Embassy building and other national property? On the reasoning of *The Arantzazu Mendi*, the lawful, the *de jure*, Government would have no remedy because of the jurisdictional immunity said to appertain to the insurgent *de facto* Government. These consequences cannot be lightly admitted. They are inconsistent with what are believed to be established rules of international law in the matter and they are contrary to the clearly declared determination of Governments to insist that there is a difference between *de facto* and *de jure* recognition. The practical results of that distinction may not be considerable in relation to the conduct of the civil war, but they are of importance in the eyes of international law. One of them is that the *de jure* government is entitled to a measure of immunity to which the *de facto* authority can raise no claim. This may mean in practice that the *de jure* government is entitled to rely on possession (unless, probably, effected in breach of the peace or otherwise in violation of the law of England), while the *de facto* government must be prepared to prove its title to possession even when it is actually or constructively in possession. This is undoubtedly an inconvenience for and a derogation from the dignity of the *de facto* authority. But these drawbacks are inherent in the situation of a power attempting to dislodge the lawful government. For this reason there may be some hesitation in accepting Lord Atkin's view that there existed in *The Arantzazu Mendi* "all the reasons for immunity which are the basis of the doctrine in international law as incorporated into our law," namely, "the same necessity for reciprocal rights of immunity, the same feeling of injured pride if jurisdiction is sought to be exercised, the same risk of belligerent action if government property is seized or injured." An insurgent group which has not yet succeeded in dislodging the lawful authority is not entitled to insist on the same consideration for its pride as the *de jure* government. The risk of belligerent action can, in the circumstances of the case, be disregarded. Even fully established governments do not go to war because jurisdiction is exercised

over their property. On the contrary, they have usually accommodated themselves to the consequences of the fact that the extent of jurisdictional immunities of States is by no means well-defined in international law; witness, for instance, the position with regard to the activities of the State in the domain of private law. As to the necessity for reciprocal rights of immunity, these may not improperly be left in abeyance pending the transitional period of the civil war. The same consideration applies to what is probably the principal reason for jurisdictional immunity of States in international law, namely, that the exercise of jurisdiction over a foreign State is inconsistent with its independence and sovereignty.

V

Even if the principles enunciated in *The Arantzazu Mendi* had not been unanimously confirmed by the Court of Appeal and the House of Lords, anything in the nature of emphatic criticism of these decisions would be misplaced seeing that it had been held—and rightly held—in other cases that a recognised *de facto* government is in the same position as a government recognised *de jure* with regard to the validity of its internal legislation and that even in the matter of jurisdictional immunities a *State* recognised *de facto* is in the same position as a State recognised *de jure*.[30] These questions are a matter of degree for the obvious reason that *de facto* recognition is a question of degree and circumstances. But a line must be drawn somewhere—unless we decide to obliterate altogether the distinction, which is firmly embedded in international practice and which is of considerable value, between *de facto* and *de jure* recognition. Reasons have been given for the view that that line must be drawn at a point when an insurgent authority which is recognised as a *de facto* government and which it wou'd be contrary to international law to recognise *de jure* claims jurisdictional immunities as against the government still enjoying *de jure* recognition. This being so, it is convenient to conclude this article by presenting two sets of conclusions—one as laid down in the successive decisions in *The Arantzazu Mendi*; the other, which appears to the writer to be more consistent with the principles of international law and with former decisions of English Courts:

1. *The conclusions in "The Arantzazu Mendi"*: Recognition of a government *de facto* has for the purposes of the jurisdictional

[30] *The Gagara*, [1919] P. 95. This case is perhaps the strongest authority in support of the decision in *The Arantzazu Mendi*. The decisive distinguishing feature is that in *The Gagara* there was no rival *de jure* government opposing the *de facto* authority either generally or in the case before the Court.

immunities of the State or of a part thereof represented by that government the same consequences as recognition *de jure*. These immunities will be accorded also in actions in which the plaintiff is the *de jure* government of the State concerned.

The Arantzazu Mendi is *not* an authority for the view that before English Courts there is no distinction whatsoever between recognition *de facto* and recognition *de jure*.

2. *The writer's submissions*: (*a*) It is an established principle that so long as the civil war lasts the recognition of the insurgents, whether recognised as belligerents or not, as a *de jure* government is contrary to international law.

(*b*) A communication of the Foreign Office relating to the recognition of insurgents must be interpreted in the light of that principle.

(*c*) It is not contrary to international law to recognise the insurgents as a government exercising *de facto* authority over the territory under its control.

(*d*) Such recognition is limited in its effects and cannot properly be assimilated to recognition *de jure*.

(*e*) In particular, while obliging courts to acknowledge the validity of the legislation of the *de facto* insurgent authority within its territory, it does not transform the authority thus recognised into an independent government of a foreign sovereign State entitled outside its territory to jurisdictional immunities, in particular as against the government recognised *de jure*, in respect of its property or its representatives.[31]

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[31] In November, 1938, the Supreme Court of Norway gave judgment in a dispute between the Spanish Republican Government and a former secretary to the Spanish Legation at Oslo who refused to deliver to the Republican Government the property of the legation. He claimed that in view of the recent agreement between Norway and the insurgent authorities concerning the exchange of commercial agents, he represented a foreign sovereign State and that the Norwegian Courts therefore had no jurisdiction. It was held that the property must be delivered up to the Republican Government seeing that the exchange of agents could not be interpreted as recognition of the Nationalist Government: *The Times* Newspaper, 8th November, 1938. The Courts of other countries were concerned with the Spanish Civil War mainly from the point of view of the effect of the requisition decrees of the Spanish Republican Government. See, e.g., the contradictory decisions of the Court of Poitiers of 26th July, 1937 (*Rousse et Maber* v. *Banque d'Espagne*) and of the Court of Rouen of 7th December, 1937 (*Etat Espagnol et Banque d'Espagne* v. *Banco de Bilbao:* Sirey, 1938, II, pp. 17–24). See also the decision of the Brussels Court of Appeal of 7th July, 1937 (*Journal des Tribunaux*, 6th March, 1938), and the decision of the same Court of 17th January, 1938 (*Rechtskundig Weekblad*, 1938, No. 2, col. 801)—both affirming the right of requisition. They are reproduced by van Hille in *Revue de Droit International et de Législation Comparée*, 3rd ser., vol. XIX (1938), pp. 332–336. And see *Moulin* v. *Volatron*, decided on 25th May, 1937, by the Commercial Tribunal of Marseilles (*Sirey*, 1938, II, p. 105), where the Court refused to give extraterritorial effect to certain nationalisation decrees of a penal character.

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ROAD TRANSPORT—ECONOMICS AND THE LAW

THE Road and Rail Traffic Act, 1933, following on the Report of the Royal Commission on Transport, 1928, and on the recommendations of the Salter Conference on Road and Rail, 1932, is a measure designed to regulate the carriage of goods by road. Section 1 (1) of the Act forbids the carriage of goods by road except under licence. Section 2 (1) divides licences into three classes, the A "public carriers" licence, the B "limited carriers" licence and the C licence for private carriers who do not carry for hire at all. Section 3 (1) determines the period for which licences are valid, 5 years for A licences,[1] 2 years for B licences and 3 years for C licences. Section 4 charges the Chairmen of the Area Traffic Commissioners, constituted by the Road Traffic Act of 1930, with the duties of Licensing Authorities. Section 6 (1) gives them "full power in their discretion either to grant or to refuse the application for an A or a B licence." Sub-section (2) requires the Licensing Authority "in exercising his discretion to have regard primarily to the interests of the public generally, including those of persons requiring as well as those of persons providing facilities for transport" and certain other minor conditions. Section 11 (2) requires the Licensing Authority, when hearing applications for licences, to take into consideration any objections to the application which may be made by persons who are already providing facilities, on the grounds that suitable facilities in that district, or between those places are or would be (were the application to be granted) in excess of requirements. Section 15 allows disappointed applicants or dissatisfied objectors to appeal against the decision of a Licensing Authority to an Appeal Tribunal, consisting of three persons, one of whom must be a lawyer.

A great many appeals have been heard since the Act became effective in 1934. It is the object of this paper to examine some of the tendencies revealed by these decisions. The author has been trained as an economist, and not in the law, and in what follows he has confined himself to the economic consequences of legal decisions. Legal rule and precept can deflect, promote and discourage economic tendencies—the law indeed, must be counted a fundamental economic force in itself, for all economic activity presupposes some type of social organisation, and the

[1] As amended by Ministerial Order under authority of the Road Traffic Act, 1937.

form this takes depends upon the law. The Act is creating a new body of law—law within which the road transport business must be operated. It is important that the economic consequences of this nascent body of law should be examined now, before the rules of interpretation which the Tribunal is laying down have had time to crystallise into rigid precedents. For it is the author's opinion that the overriding interest of the public in an economic and efficient transport service, which the Act explicitly recognises and safeguards (Section 6 (2)) is being jeopardised by the construction which the Tribunal is placing upon the Act—a result surely contrary to the purposes of the Act and one which could never have been intended by Parliament.

The central principle underlying the decisions of the Tribunal is this—

(1) Suitable transport facilities in excess of requirements create wasteful competition.

(2) Wasteful competition is not in the public interest nor in the interest of those requiring or providing transport, and is therefore against the intentions of the Act.

From this principle the Tribunal infer that additional licences should not be granted when suitable facilities are already in excess of requirements, or would become so were the licence to be granted.[1a] Thus, in order to set up as a haulier, or in order for an established haulier to expand his business, the applicant must prove a need for his service; that is, he must show that existing transport facilities are inadequate or unsuitable, and that there is a demand for his service.

It is to be noted that the Act itself says nothing at all about wasteful competition. The term is nowhere mentioned. Nor does the Act guide the Authorities and Tribunal. No definition is given of "need" or of "suitability." It has been left entirely

[1a] (All references to Sweet and Maxwell, Railway Canal and Road Traffic Cases, edited by Maxwell and Fay.) (Italics mine.)

L.M.S. & L.N.E. Rly. Cos. and J. T. Dunnett, Vol. 23 at p. 280.

G.W. & L.M.S. Rly. Cos. and Smart, Vol. 24 at p. 281—

"The conclusion we have come to is that, generally speaking, it would not be in the public interest or in the interest of persons requiring or providing transport facilities for a licensing authority to authorise a person to use additional vehicles if on the facts of the case he decided that suitable transport facilities in the district intended to be served by the applicant or between the places the applicant intends to serve exist and are in excess of requirements, or if the application were granted would be so. *Our principal reason* for coming to this conclusion is that in our opinion if a licensing authority *authorises suitable transport facilities in excess of requirements the inevitable result will be wasteful competition* which in our opinion is not in the public interest or in the interest of persons requiring or providing facilities for transport."

Four Amalgamated Rly. Cos. and Bouts-Tillotson, Vol. 25 at pp. 179–180 where this passage was quoted and reaffirmed, and at pp. 181–182.

to the Tribunal to decide what is meant by these terms, and definition must be sought in the very large number of cases which have been decided by the Tribunal.

On the question of "*suitability*," the evidence required is that of the trader, the haulier's customer, who must appear *in person* to support the application.[2] The trader must show that existing facilities, generally the services of the objecting railway company, are unsuitable for his traffic and that the facilities the applicant is offering are more suitable. But it is no use the trader *asserting* that this is the case. He must prove it to the satisfaction of the Licensing Authority and against the cross-examination of railway counsel. The trader's evidence is not always accepted as final.[3] In a number of cases it has been held that the trader has not shown that the railway facilities are unsuitable for his traffic or not so unsuitable that road service is justified. Thus the trader is not the final judge of what form of transport suits his traffic best. That lies with the Licensing Authority and the Tribunal.

The problem of deciding whether "suitable" facilities are in excess of requirements can never be an easy task; but it is made much more difficult when the Authorities do not know quantitatively what the requirements are, nor even what facilities are already available. The only information which the Licensing Authorities have before them when they are asked to grant or refuse licences, besides such knowledge as they may themselves have acquired of the general position in their area, is evidence brought by the applicant to show that his services are in demand and fulfil a need; the statements, that is, of one, or at the most, the few traders supporting the application, that they cannot get the transport they require or that existing services, although adequate, are unsuitable; and on the other side the evidence of the objector, that he can provide or is providing all the services which the applicant's customers can demand. The objector is usually the railway company and the objection is often, in effect, that the railway service is both adequate and suitable for all the needs of the particular traders who are supporting the application or for whom the applicant carries.

The public need for road transport services within the terms of the Tribunal's decisions depends upon the *in*convenience

[2] *Charman and Southern Rly. Co., Vol.* 22, p. 116.
Hawker and G.W. & L.M.S. Rly. Cos. (No. 2) Vol. 25, p. 99.
[3] *Shepherd and L.M.S. Rly. Co.*, Vol. 23, p. 173.
Hawker and G.W. & L.M.S. Rly. Cos., (No. 2) Vol. 25, p. 99.
L.M.S. & L.N.E. Rly. Cos. and Stevenson Transport Ltd., Vol. 25, p. 328.

which is suffered by traders who have to do without that service.[4] The public interest is served by the provision of road transport only if some degree of positive inconvenience would result to someone were that transport not available;[5] an inconvenience which must be so acute that some trader is prepared to waste his time telling a Court about it and be willing to submit to cross-examination about the details of his business by railway counsel. Without that inconvenience, the Tribunal is, in fact, maintaining that a service cannot be necessary and that there is no justification for it in the public interest.

The Tribunal and the Licensing Authorities have here adopted a very rigorous standard. In most fields of economic activity, it has generally been considered that the public interest is promoted and the service in question justified if it does no more than provide an additional convenience for the public. Indeed in theory, and even to-day in practice as well over a very large field, it is still considered evidence enough of public need if a profit can be made from the provision of a service or the production of a particular commodity. But the Tribunal has expressly refused to allow the fact that additional road transport would be a convenience[6] to the trader or that a profit[7] might be

[4] *Ridgewell and Co. and Southern Rly. Co.*, Vol. 22, p. 6.
Hawker Ltd. and G.W. & L.M.S. Rly. Cos., Vol. 23, at p. 29.
G.W. & L.M.S. Rly. Cos. and Smart, Vol. 24, at p. 283.
H. W. Hawker Ltd. and G.W. & L.M.S. Rly. Cos., (No. 2) Vol. 25, at p. 106.
". . . the appellants had to establish a case within the terms of our decision in *Ridgewell's Case* . . . and to do that they had to prove that since the date of the grant of the first application for a variation (1) there had been an increase in their own business; (2) there had been an increase in the business of their customers . . . and (3) *their customers had suffered inconvenience* by reason of the appellants not having been able to provide the transport they required. In saying this we are only repeating what we have said in a number of cases . . ." and at p. 109.
Four Amalgamated Rly. Cos. and T. W. Foster, Vol. 24, at p. 272.

[5] *John and Patricia Forrester and G.W.R. Rly. Co. Ltd.*, Vol 23 at p. 228 where the Licensing Authority said: "At the hearing on July 31, 1934, I came to the following conclusions—
"(1) That the appellants had by putting on the road eleven new vehicles . . . flooded the market . . .
"(2) That such traffic had *in the past* been carried by other carriers including the railway company without complaint.
"(3) That such other carriers could have continued to carry such traffic without any *undue* inconvenience to the public." At p. 239 the Tribunal said: ". . . we are of the opinion that Mr. James (the licensing authority) was fully justified in expressing the views and in coming to the conclusions which he did."

[6] *L.N.E. & L.M.S. Rly. Cos. and Gimson*, Vol. 24 at p. 85.

[7] *Axford and Southern Railway Co.*, Vol. 24 at p. 82.
"The only evidence which was called in an attempt to establish a prima facie case was that of Mr. Axford who suggested that now he has occasion to make journeys to Glasgow, it would be more economical or profitable for him if he was allowed to carry goods on his return journey for persons other than the British Lead Mills. In our opinion Mr. Axford . . . has . . . failed to establish a prima facie case."

made out of a particular service to rank as evidence of public need.

An established haulier, one, that is, already in business, can obtain licences for additional vehicles if he can show—

1. That there has been an increase in his own business.

2. An increase in the business of his customers or of some of them or in the industries in which those customers are engaged, and

3. That some at least of his customers have been put to inconvenience because the applicant has not had sufficient vehicles available to serve them.[8]

All this must be proved by oral evidence.

Licences will only be granted to persons wishing to enter the haulage business for the first time if they can prove a need for their services, a need which is not being met by some existing carrier. To do this they must show—

(1) That there are persons able and willing to employ them, and

(2) That the haulage work they are proposing to do could not be done by some existing carrier by road or rail,[9]

and once again oral evidence on these points will be necessary. Thus the road haulage business has ceased to be an industry which one may embrace because one wants to make a living or because one sees a chance of providing a service and gaining a profit. The intending haulier must prove a need, and a need within the terms of the Tribunal's decisions.

A licence for additional vehicles will be refused if it is shown that the traffic to be carried by the applicant has been, or will be, abstracted from some other operator by rail or road, who is already providing an adequate and suitable service.[10] To justify

[8] *Ridgewell and Co. and Southern Rly. Co.*, Vol. 22, p. 6.
L.N.E. & L.M.S. Rly. Cos. and Beazley, Vol. 24, p. 111.
H. W. Hawker Ltd. and G.W. & L.M.S. Rly. Cos., (No. 2), Vol. 25 at p. 106.

[9] *Enstone and Co. and L.M.S. Rly. Co.*, Vol. 22, p. 3.

[10] *Enstone and Co. and L.M.S. Rly. Co.*, Vol. 22 at pp. 5–6.
(The applicant) "must lead evidence sufficient to make out . . . that the haulage work which he proposes to carry on or embark upon cannot for some reason be done by other operators already engaged in carrying, whether by road or by rail."
Petrie and G.W. Rly. Co., Vol. 22 at p. 16.
L.N.E. Rly. Co. and Brownbridge, Vol. 22 at p. 256 and p. 257.
". . . the traffic which he would carry if authorised to use another vehicle would be traffic abstracted from the railway company or other hauliers."
Henry and Elsie Shepherd and L.M.S. Rly. Co., Vol. 23 at p. 175.
Forrester v. *G.W. Rly. Co.*, Vol. 23 at p. 228 and p. 233.
L.N.E. Rly. and Hurd; Newhams Ltd., and Hurd., Vol. 22 at p. 149.
H. W. Hawker Ltd. and G.W. & L.M.S. Rly. Cos. (No. 2), Vol. 25 at p. 110.
". . . if the applicants sought to be authorised to use additional vehicles for the purpose of carrying Harris' traffic, he must, in view of the fact that this traffic had hitherto been carried by rail, be satisfied that there was some good reason why it should no longer be so carried; . . ."

a licence, the traffic to be carried must therefore not be obtained at the expense of somebody else—it must be a new traffic[11] or a traffic for which existing facilities are less suitable than those proposed.[12] But new traffic, no matter how strong may be the potential demand, will not be able to show itself as ton miles of transport until the service needed to carry those ton miles is made available and has had time to develop the demand. It seems, therefore, that the Tribunal has blocked the door to any expansion of the road transport business above the level of the base year, 1932/3. For only new business can justify a licence for additional vehicles. That business will not normally be evident as traffic until those vehicles are carrying it; and the Tribunal will not allow a licence to be granted until the new traffic is there to be proved. The hindrance to expansion is fortunately not so complete as this, since a haulier, already licensed to provide a service, can develop new business and then apply for additional vehicles, broadly on the grounds that his vehicles are overworked because of the increase in his business, and his customers, both new and old, are being put to inconvenience.[13]

The other gateway for the intending haulier is for him to show that he can provide a suitable service where none is available. This cannot be an easy thing to prove when there can be no opportunity of giving a practical demonstration until a licence is granted and, of course, the licence will be withheld until such proof is forthcoming.

But even in cases where an operator has had the opportunity of developing a new and apparently successful business, the licence is not always granted. Too great a success may arouse the suspicions of the Licensing Authority and cause him "to consider very carefully whether to grant additional facilities would have the effect of abstracting traffic from other persons

[11] *John Rhodes and L.M.S. Rly. Co. and another*, Vol. 22 at p. 268.
"The appellant admitted in evidence . . . that the carrying he was doing was not new traffic . . . further he stated that the traffic he was now carrying had been previously carried by other persons."

[12] *Smith and L.M.S. Rly. Co.*, Vol. 22 at p. 265.
"In our opinion there was evidence that the facilities provided and to be provided were of a special type such as did not exist in the Manchester district before the appellant started his service."
L.M.S. Rly. Co. and Tait and MacConn., Vol. 22 at p. 203.
"Mr. Wilson has pressed upon us that . . . before the respondents made their application, goods belonging to the traders . . . must have been carried by somebody. We have no doubt that that is correct but the vehicles . . . in which they were carried were not suitable for the carrying of the class of goods which those traders wanted to be carried."
John Edwards and L.M.S. Rly. Co., Vol. 23 at pp. 68 and 71.

[13] *Hawker Ltd. and G.W. & L.M.S. Rly. Cos.*, Vol. 23 at pp. 36–37.
G.W. & L.M.S. Rly. Cos. and Smart, Vol. 24 at p. 285.

already providing transport facilities in that area."[14] This application was not refused on the ground that the business had been too successful. But very rapid growth did not seem to have helped the applicant at all.

Even more significant is *Forrester's Case.*[15] Forrester had established a parcels service connecting Cardiff with the inland villages up the valleys. He provided a service which did not exist before, and worked up traffic between Cardiff and these villages, profitable to himself, and apparently of convenience and value to the public, judged at least from the fact that his service was patronised. This business was new business, since there had been no traffic between Cardiff and these villages before, and it met a public demand. The demand, admittedly, had not been evident before the applicant instituted his service. It remained potential only and did not become active and effective until enterprise, in the person of Mr. Forrester, provided the service which allowed this potential demand to manifest itself as the offer of ton-miles of transport between Cardiff and villages hitherto unconnected with that centre.

On the face of it, this would seem to be an eminently suitable case entitling an operator to a licence. A hitherto unsuspected public demand is shown to exist, a service is provided to satisfy it, and new business worked up thereby—clear evidence of public need. The operator applied in due course for a licence for his vehicles. His application was refused in part and this refusal was confirmed on appeal. It was refused because the services proposed were too frequent, so frequent as to be wholly wasteful and unnecessary, and because the natural centres for the villages without direct rail connection with Cardiff were towns other than Cardiff. Enterprise in this case had shown a demand to exist, but the Licensing Authority would have none of it. This demand should not be satisfied because, in the Licensing Authority's own words, there was no "community of interest" between Cardiff and the places named. Community of interest had had, so far, no opportunity to develop, because there were no easy and direct connections between these places. Unable to obtain his licence, this applicant has been forced to provide some of the services with horse-drawn vehicles!

This case has not become a leading case, nor has it been cited in any subsequent appeal. This is perhaps fortunate, otherwise an operator, to justify the grant of a licence, might have to

[14] *Henry and Elsie Shepherd and L.M.S. Rly. Co.*, Vol. 23 at p. 175.
[15] *John and Patricia Forrester and G.W. Rly. Co.*, Vol. 23, p. 225, especially at pp. 231–233.

prove, not only that there was an unsatisfied demand to be exploited, but also that this demand arose out of a proper and acceptable community of interest between the places he intended to serve—a task which might involve a considerable amount of historical and sociological research.

Licences only last for a limited time and renewal is not automatic. Each applicant for renewal must prove that there is a continuing need for the services which are being provided. The Tribunal will grant a renewal if the applicant can show—

(1) That during the currency of his previous licence his vehicles had been regularly and fully employed;

(2) That there has been no material change in the circumstances of his business.[16]

Provided always that there are no overriding circumstances, such as the existence of adequate and suitable facilities without the applicant's service, then the licence will be renewed. But if, for example, the railway company can show that its services are suitable and adequate, then the renewal will not be granted, even though it is held that the applicant's vehicles have been regularly and fully employed in the past and that there has been no material change in his business.[17]

Change in material circumstances are such things as changes in the areas served, in the traffics carried or, apparently, in a haulier's customers. If any such change has occurred, then the applicant must start afresh to prove a need for the new services he is now operating.[18]

The Act of 1933 does not specify the rates charged by road operators among the matters which Licensing Authorities shall consider, and the Tribunal has refused to allow questions of rates as relevant evidence.[19] It seems very extraordinary to the

[16] *Four Amalgamated Rly. Cos. and Bouts-Tillotson Transport*, Vol. 25, p. 158.

[17] *L.N.E. Rly. Co. and Blyth Transport Ltd.*, Vol. 26, p. 202.

[18] *Modern Haulage Services Ltd. & L.M.S. & L.N.E. Rly. Cos.*, Vol. 25 at pp. 285–6 and p. 288.
Hargreaves and L.M.S. Rly. Co., Vol. 26 at p. 59.
O'Sullivan and G.W. Rly. Co., Vol. 26 at p. 160.
Barnett Joel Ltd. and L.N.E. Rly., Co., Vol. 26 at p. 141.
Oxlade and G.W. Rly. Co., Vol. 26, p. 234.

[19] *L.M.S. Rly. Co. and A. L. and P. Ingleby*, Vol. 24 at p. 299.
Four Amalgamated Railway Cos. and Bouts-Tillotson, Ltd., Vol. 25 at p. 175—

"We think it is clear from the Act that the legislature did not intend that the licensing authority should, when exercising his discretion, have regard to the fact that in very many instances goods can be and are carried by road at rates which though economic to the road haulier are lower than the rates at which the railway companies can carry those same goods." This opinion was quoted and reaffirmed in *L.M.S. & L.N.E. Rly. Cos. and Stevenson Transport*, Vol. 25 at p. 334:—
"After giving further consideration to the matter, we are of opinion that the Legislature did not intend that questions relating to rates should be taken into

layman that a piece of legislation should have been placed upon the Statute Book, or that a competent Tribunal should make decisions, in which the questions at issue are a matter of economics and not of law; and even more, in which the main question to be decided is usually the provision of a greater or less amount of a competing service, without there being considered *at all*[20] the relative prices at which these services are offered. The suitability or otherwise of two services cannot be compared unless the prices at which they are being provided are also considered. A service which is suitable at one price may be distinctly unsuitable at another, higher, price; and a service suitable enough at the price asked in and by itself may become unsuitable just because an equivalent service is being offered at a lower price or a better service at the same or even a higher price.

The Licensing Authorities are asked to decide whether or not existing facilities are suitable and whether such facilities are, or are not, in excess of requirements. Neither of these questions can be answered reasonably without reference to the prices asked for the services.

In most of the cases which come before the traffic courts supported by the evidence of traders, it is claimed that the road services are at least equal to, if not better than the railway services, and the charge by road is almost always the less. From the trader's point of view, therefore, there can be no doubt that

consideration when deciding whether or not an objector had proved that suitable facilities exist. This opinion is based on the provisions of the Act and on the assistance which we think can be obtained from a study of some of the provisions of the Road Traffic Act 1930." See also pp. 334–336.

But in *Bouts-Tillotson Ltd. and Donaldson Wright Ltd.*, Vol. 23 at p. 129, the Tribunal held that "a licensing authority is in our opinion on that issue (of public need for additional vehicles, the issue that is "whether if the application were granted transport facilities would be in excess of requirements") and only on that issue entitled to take into consideration allegations that applicants had been carrying goods at rates uneconomic to themselves." See as well, *L.M.S. Rly. Co. and Ingleby*, Vol. 24 at p. 297; *L.N.E. & L.M.S. Rly. Cos. and Beazley*, Vol. 24 at p. 116 . . . "whether the increase (of gross receipts) is due to "false traffic," e.g. traffic which has been obtained by charging rates which are uneconomic to the applicant." *and L.M.S. & L.N.E. Rly. Cos. and Stevenson Transport*, Vol. 25 at p. 336:—"What we have said in this decision on the subject of rates (quoted above) is not intended in any way to alter or vary what we said in the appeal of *Bouts-Tillotson and Donaldson Wright Ltd.*, with regard to rates which are proved to be uneconomical rates and with regard to "false traffic." In *Alexander (Charles) and L.M.S. & L.N.E. Rly. Cos.*, Vol. 26, p. 260, the Tribunal distinguished this precedent "As at present advised we are not prepared to go further than to express the opinion that in coming to a decision on the question of "suitability" the fact that the rates charged by Mr. Alexander are lower than the rates by rail should be taken into consideration if it was proved that the traffic would not pass *at all* but for those lower rates being available" (p. 295). (Italics mine.)

[20] Except in the extreme case where the traffic would not be forthcoming without the lower road charge.

the railway services are relatively unsuitable. Lower rate by road makes road transport more suitable than railway, for business purposes, in all cases where the two services are at least equal in quality.

The case is the same with the question of facilities in excess of requirements. Facilities will exceed requirements when more service is provided than will be used at the price currently being asked. If the provision of facilities at a relatively low price is refused because there are available transport services at a higher price, then some of the demand must be unsatisfied—that part of the demand which is prepared to employ the service at the lower price. Consequently the total of facilities available at the higher price will be less than is required to meet the demands of the public. The law does not recognise the existence of any elasticity in the demand for transport, does not appear to appreciate the point that if a new and, in certain respects, improved transport service is offered at a lower price, then the demand for transport will increase and the facilities provided, adequate enough at the higher price, will no longer meet "requirements" of a demand enlarged now that transport is to be had at a lower price.

The rate of progress in the technique of road transport is very rapid at the present time. Improvements are constantly being made in the design of motor vehicles and the costs of operation are being substantially reduced. These advances in operating efficiency, if they are to be passed on to the trader, will be passed on mainly in the shape of lower rates. Any increased traffic which the road operator secures as a result of lower rates will be in part traffic obtained at the expense of the railway companies. But that is inevitable and not undesirable. If technical progress is less rapid in railway working than it is in road transport, measured by the rate at which costs are being reduced, then road transport becomes to that extent relatively a more efficient method of transport, and it is in the public interest that the more efficient method should be allowed every opportunity to expand, even though it may be at the expense of the less.

If the trader is to be benefited and the public interest thereby served by any improvement in the technique of road transport which tends to reduce rates, the trader must be allowed to send his goods by road, and also to transfer his traffic from rail to road if the lower road rate makes this worth while. The demand for road transport will be increased as much by the diversion of traffic from the railway as by the creation of new traffic, stimulated

by the lower rate. A road haulier should be allowed to expand in response to this demand.

Unfortunately neither the Act nor the Tribunal will allow reduced charges for road transport, whether the result of improved technique or not, to be a matter justifying an increase in the number of vehicles. Reduction of road charges is not prohibited, but licences are not granted when it is evident that the intending haulier has obtained his traffic or will obtain it at the expense of some other operator, rail or road. Thus there is serious danger that the Act, as interpreted by the Tribunal, will prevent the very rapid improvement which is taking place at present in the operation in road transport from being passed on to the trader and, through him, to the public.

By its rules of interpretation, the Tribunal has inhibited very much both change and enterprise in the road transport business. Enterprise does not have the opportunity of working up new services and thus creating a demand for its product, and any change in an existing business is very much discouraged lest these changes should jeopardise renewal. This again blocks enterprise, for enterprise in an established business cannot make itself felt without bringing changes in its train. The road haulage business to-day, consisting as it does of a very large number of small businesses in active competition with each other, and nearly all under the immediate personal control of their owners (and, more often than not, of their founders too), is a business in which conditions are particularly favourable for the consumer to enjoy the fruits of enterprise. Yet road transport is not permitted to offer the quantity of transport which provides the most efficient service to the trading community: it is being restricted to providing a quantum of service just enough to remove inconvenience. The trader in effect is being prevented from choosing the type of transport which suits him best, not because the Licensing Authority and Tribunal are dictating which he shall patronise, but because, wanting to use road transport, he may not find the facilities are available because the licences have not been issued.

Then the whole business of restriction is being made very irrational, for what is often the real reason and justification of the demand for road transport, cheaper rates, cannot be considered in evidence. Thus, unable to plead lower rates, many traders are forced into far-fetched and not very plausible reasons for preferring road transport, when their real ground is the lower charge compared with the railway rate.

The losers by restriction are the traders immediately, and

the public ultimately, for the development of a new and cheaper transport service is hindered; and a number of new services which this technical development makes possible are prevented from coming into existence. The beneficiaries should be both the haulier who can keep his licence—for he is protected from the competition of new entrants to the haulage business—and the railways who obtain the traffic which the restricted road haulage business has not the capacity to handle. The existing hauliers have not gained as much as might be expected. For one thing, competition between them has remained exceedingly active, despite the opportunities for combination offered by restriction. For another, the demand for road transport has been rising so rapidly since the Act became effective in 1934, that established hauliers would have gained more from the unlimited right to extend their fleets than they would have lost through the influx of new firms into the business, particularly as goodwill is a very important part of a haulier's stock-in-trade—a goodwill which would have protected the established haulier against the competition of the newcomer. The real beneficiaries of the restrictions imposed on road transport by the Act of 1933 and the Tribunal are the railway shareholders, who have received a dividend in recent years, where none otherwise would have been forthcoming.

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BUILDING SOCIETIES AND POOLING AGREEMENTS

THE BORDERS CASE AND ITS CONSEQUENCES

THE great interest[1] shown by the public in the case of *Bradford Third Equitable Building Society* v. *Borders*, [1939] 1 All E.R. 481, was not solely due to the fact that a taxi-driver's wife (nicknamed "Portia" by the Press) was arguing her case in person against the best brains of the Chancery Bar, but was also due to a realisation that the legal points in issue affected many of them very closely. This interest was indeed fully shared by the legal profession; so much so that when Bennett J. came to deliver his judgment the corridor outside his Court was filled with a crowd of solicitors and barristers struggling with the ushers in an endeavour to force an entry into the already over-crowded court.

As will be shown later, the case was important not so much for what it decided, as for the points that it raised and the action of the legislature which it inspired. But before dealing with the case itself it may be advisable to explain shortly the exact nature of the arrangements usually made between the Building Societies and builders of estates of houses.

As is well known, a prudent mortgagee does not normally lend more than 75 per cent (at the most) of the value of the security; on the other hand, most purchasers of small houses cannot afford to put down a deposit of anything like 25 per cent of the purchase price and in fact builders usually advertise that they can arrange building society advances up to 90 or 95 per cent. This does not mean, as the uninitiated might suppose, that the building societies are of the opinion that the houses are really worth substantially more than the purchase price—that, of course, is most unlikely to be the case. The building societies will not be prepared to lend more than 75 or 80 per cent on the house alone; if more is to be advanced collateral security will have to be given. In order to provide this collateral security the builder enters into a "Pooling Agreement" with a building society which provides that whenever the society advance more than their normal proportion the builder shall guarantee the repayment of the excess, the whole or a proportion of which shall be retained by the society out of the purchase price and placed to the credit of a pool account which the builder charges as

[1] It was even the subject of a music-hall joke—"We may have no frontiers but we have our Borders."

collateral security. Thus if the value of the house and the selling price is £1000 and the society's normal advance would be £750 but the purchaser requires an advance of £900, then £150 of the purchase price may have to be left in the pool. This pool furnishes a continuing collateral security for all such mortgages granted to purchasers of houses on the building estate and frequently it is provided that the proportion to be retained in the pool shall progressively decrease with the number of mortgages granted. When a purchaser has repaid to the society sufficient to reduce the amount outstanding on his mortgage to the level of a normal advance (or, in some cases, to a lower level) the amount of the excess left in the pool is repaid to the builder. If on the other hand the purchaser defaults on the mortgage and the house is sold by the society at a loss the amount of this loss is deducted by the society from the pool.

It will be noticed that under this arrangement it is not the purchaser-mortgagor of the house who furnishes the collateral security, but the vendor-builder, who finds it necessary to do so in order to sell his houses. The purchaser need not know anything of the arrangement made between the builder and the society and may think that the whole advance is made on the security of the house alone. It may be mentioned that the Pooling Agreement usually provides that if the purchaser defaults on his mortgage, the vendor-builder shall take a transfer of mortgage from the society or shall purchase the house from them at a price equal to the amount then outstanding on the mortgage together with all interest, fines and costs. So far as repurchasing is concerned, this clause has always been regarded as of very dubious legality. It is well established that although a mortgagee is not a trustee of his power of sale he must nevertheless conduct the sale properly and sell at a fair price, but in fact under such an arrangement the purchase price is determined in a manner which bears no relationship at all to the value of the house. On the other hand it is rare for any real hardship to be caused to the purchaser; he normally regards the mortgage instalments as something in the nature of rent and if he cannot continue to pay he is only too pleased to vacate and does not care what happens to the property so long as he is not sued on the personal covenant. Moreover, default usually occurs before many instalments have been repaid and it must be comparatively rare for builders to make a profit as a result of a repurchase. On the other hand, such an arrangement is beneficial to the builder since if the society sell to a third party and make a loss it will be deducted from the pool and, therefore, borne by him. He is in at least as

good a position as the society to effect a sale at a good price and if any redecorations are necessary he can effect them more cheaply than the society could do. It is, therefore, better for him to repurchase and thus to preserve the pool intact. It may well be, however, that he has not the necessary cash available to repurchase. In this event it is usual for completion of the contract to repurchase to be postponed until the builder finds a new purchaser when the society will convey direct to the new purchaser. In the meantime, a contract to repurchase is in existence and the house can, therefore, appear in the books of the society as having been resold without loss, and this even although it may be highly problematical whether completion will ever take place!

In the *Borders Case* the Building Society had advanced on a freehold house £693 out of the total purchase price of £730. The normal advance would have been £545 but the Society had taken collateral security from the builders under a Pooling Agreement of the type explained above. The builders subsequently went into liquidation so that when the purchaser (Mrs. Borders) failed to keep up her repayments the Society were unable to exercise any rights they may have had against the builders to compel them to repurchase but were forced to exercise their power of sale. As a preliminary they issued a writ for possession. Mrs. Borders in her defence alleged that she had never executed the mortgage deed on which they sued. The learned Judge decided that they had not succeeded in establishing that the deed ever had been executed by her and their claim therefore failed. The evidence on this point is reviewed at some length in the judgment and is certainly not devoid of interest. It is, however, a pure question of fact raising no point of legal interest. A point of law of some slight interest did arise on the contention of the Society that Mrs. Borders was estopped from alleging non-execution of the mortgage since she had made certain repayments under it. The Judge rejected this contention on the ground that she had stated the facts as she alleged them to be at the time when she made these repayments. This aspect of the matter requires no further consideration. Neither does Mrs. Borders' contention that the Society were not entitled to possession since three months' subscriptions were not in arrear; this too was a pure question of fact and of construction of the mortgage deed and on this point the Judge found in favour of the Society.

The first point of real legal importance was raised by Mrs. Borders' further ground of defence, namely, that the transaction between the Society and herself was *ultra vires* the Society owing

to the existence of the Pooling Agreement. In support of this contention she relied on the provisions of the Building Societies Acts and on the rules of the Society. S. 13 of the Building Societies Act, 1874, provides for the formation of societies for the purpose of raising a fund for making advances to members "upon security of freehold copyhold or leasehold estate by way of mortgage." S. 25 of the Act (as subsequently amended) makes provision for the investment of funds "not immediately required for its purposes," but this section clearly has no relevance to this case which accordingly turns on the true construction of s. 13. It will be observed that this refers only to "freehold copyhold or leasehold estate" and it is clear that the pool is not "freehold copyhold or leasehold estate." On the other hand, the section places no limit on the amount that can be advanced; there is nothing to prohibit an advance on freehold or leasehold estate up to 100 per cent of its value and it therefore seems absurd if the transaction is invalidated because additional security is taken.

The only direct previous authority on this point was *Sheffield & South Yorkshire Permanent Building Society* v. *Aizlewood* (1884), 44 Ch.D. 412. In that case a loan had been made upon a mortgage of a leasehold colliery and as collateral security a charge upon certain interests in personal estate. It was held by Stirling, J., that the whole transaction was not invalidated by the inclusion of the collateral charge, otherwise, as the learned Judge pointed out, it might be argued that the inclusion of a personal covenant might invalidate the mortgage. But the Judge added (at p. 452)—

> "The benefit so obtained must, however, be purely collateral and the validity or propriety of the transaction is to be tested as if no such ingredient entered into it. If there be no freehold, copyhold, or leasehold estate comprised in the security, or if the estate so comprised be merely nominal, or its value out of all proportion to the amount advanced, the transaction is beyond the powers of the society and invalid; but where, as here, the borrower offers as security such estate to a substantial extent, an advance is within the powers conferred by the Act of 1874 and the question for the officers of the Society to determine is what amount may properly be advanced. . . ."

On the basis of this decision, Bennett, J., decided that the mortgage in question was not beyond the statutory powers of the Society—

> "It is," he said (at p. 496), "a mortgage of freehold estate. The security of the freehold estate is not merely nominal. As between the plaintiffs and the defendant the transaction is one of loan on the security of freehold property. It is not a case in which freehold land

has been added to unauthorised security merely to make it appear that the transaction was one of loan upon authorised security when the truth was otherwise."

Although these observations were presumably *obiter* in view of the previous decision that the mortgage deed had never been executed by the defendant, they constitute a clear statement that a mortgage on land is not invalidated by the addition of collateral security provided that the land constitutes the primary and basic security. On the other hand, they do not determine whether the pooling agreement and the collateral security were valid as between the Society and the builders. This important point was not raised and it seems could only have been raised in an action between the Society and the builders or possibly by a member of the Society suing on behalf of himself and all other members. It was indeed expressly left open by the learned Judge, who continued—

> "I express no opinion upon the validity of the pooling agreement between the plaintiffs and Morells (the builders), or upon the validity of the collateral charges given by Morells to the plaintiffs. That raises quite different considerations, and those considerations are not raised by the defendant's defence."

Nevertheless it seems that in view of the terms of s. 13 the collateral charges cannot be valid; the pool is definitely not "freehold, copyhold or leasehold estate" and the opinion that a charge is only valid if on such estate appears to underlie the Judge's decision. This view is supported by the observation of Lindley, L.J., in *Cullerne* v. *London and Suburban Permanent Building Society* (1890), 25 Q.B.D. 485, at page 488—

> "On looking carefully at the statutes by which these societies are governed . . . it certainly does appear that building societies can only advance money on the security of landed property, freehold, copyhold or leasehold."

As we shall see, this point is to be dealt with by legislation.

But on the question of *ultra vires* Mrs. Borders had a second string to her bow; she contended that in any case the transaction was outside the scope of the rules of the Society. These provided, *inter alia*, that the object of the Society should be "to make advances on freehold or leasehold estate by way of mortgage pursuant to the Building Societies Acts" (Rule 1). By Rule 23 the land proposed as security had to be valued by the Society's valuer. Rule 24 provided that, "When the directors are of opinion that the premises are a sufficient security . . . the amount granted shall be paid to the borrower on his executing a mortgage of the premises. . . ." The learned Judge construed

Rule 24 as limiting the amount which the directors might advance "to such an amount as they think can be recovered out of the land taken as security without regard to anything else" (page 497). There had, therefore, been a breach of Rule 24 since but for the collateral the directors would only have advanced £545 instead of £693. But the Judge held that a mere breach of the Society's rules did not invalidate the transaction provided that it was within the statutory powers of the Society. This is a question of some difficulty upon which the legal principles are not entirely clear. Apparently since the rules can be altered by the members in general meeting, a breach of them must be regarded as a mere domestic matter only concerning the members of the Society and not affecting third parties.

In addition to her defence, Mrs. Borders counterclaimed (1) for damages for fraudulent misrepresentation and (2) for an injunction to restrain the Society from continuing to enter into similar *ultra vires* transactions in the future.

The latter claim can be disposed of shortly. It failed because the Judge had already held that the transaction was not *ultra vires* and because Mrs. Borders could only obtain an injunction if she was a member of the Society and this she had never become since she had not executed the mortgage.

The first claim is more difficult and interesting. The Judge held that it had been represented to her: (i) That the houses on the estate were inspected more than once by the surveyors to the local authority and the Society respectively; (ii) That the Society would advance upon the security of one of the houses 95 per cent of its contract price; and (iii) That this alleged fact was proof that the houses were exceptionally well-built. In fact the house was damp, badly built of bad materials and did not comply with the local bye-laws, while 95 per cent was not, of course, lent on the security of the house alone. He held, however, that the representations were made by the builders only and not by the Society who were, therefore, not responsible for them. The position was complicated by the close relationship between the builders and the Society which is bound to exist when there is a pooling agreement. This was accentuated in the present case since the secretary of the builders was the managing clerk of the firm of solicitors who acted as agents of the Society's solicitors for certain purposes; moreover, some of the representations were made in a brochure of which the directors of the Society were apparently aware. Nevertheless, the learned Judge held that none of these facts was sufficient to make the Society responsible for the representations. The analogous question of

whether a society should not be deemed to give some warranty of the fitness of the house will be discussed at greater length in connection with the impending legislation.

It may be mentioned, that Mrs. Borders' appeal on the dismissal of her counterclaim has been set down for hearing.[2]

As a result of this decision two Bills have been introduced by the Government and Miss Ellen Wilkinson respectively. Broadly speaking the Government's Bill is designed for the protection of building societies; it only incidentally protects purchasers of houses by enacting the code of ethics which some of the more reputable building societies have already laid down. Miss Wilkinson's Bill on the other hand is designed to protect purchasers, but in view of the Government's action it has no chance of becoming law and will only be dealt with here for the purpose of comparison with the Government's Bill, which has already been given a second reading in the Commons.

Attention should first be drawn to Clause 10 (1) of the Government's Bill which provides that nothing in the Bill shall deprive a party to any proceedings instituted before the 21st February, 1939, of any relief to which that party would otherwise have been entitled in such proceedings. The Bill cannot, therefore, affect Mrs. Borders' appeal nor any similar action (though there does not appear to be any) instituted before the prescribed date. It may perhaps be mentioned that judgment in the Borders case was delivered on the 13th February.

Clause 1 of the Bill provides that: "In determining the amount of any advance made to a member before the commencement of this Act upon the security of freehold, copyhold, or leasehold estate, a society shall be deemed always to have had power to take into account, besides the freehold, copyhold, or leasehold estate, the value of any other security for the advance." Existing collateral securities under pooling agreements and other arrangements are, therefore, declared to be valid. Miss Wilkinson's Bill contains a similar clause, but she would limit their validity to cases where the value of the land is not less than three-fourths of the amount of the advance.

However, as regards advances made after the commencement of the Bill, the value of additional security is only to be taken into consideration if it is of a class authorised by Part I of the Schedule (Clause 2 (1)). By Part I the following classes are authorised—

1. A charge upon a policy of life assurance. By Clause 2 (2)

[2] But her application to be supplied with free copies of the shorthand notes for the use of the Court of Appeal to enable her to prosecute her appeal has since been refused (*The Times* Newspaper, May 18th, 1939) and it seems that this will prevent her from carrying the case further.

such a policy is to be valued at an amount not exceeding the surrender value at the date of the advance.

2. A guarantee given by an assurance company.

3. A guarantee given by a local authority or county council under s. 91 (1) (*b*) of the Housing Act, 1936, or the equivalent provision of the Housing (Scotland) Act, 1925. By virtue of this section local authorities may enter into such guarantees for the purpose of aiding in the improvement of housing accommodation.

4. A charge given by the member of the Society upon money deposited with the Society or trustee investments. It must be noticed that this only refers to charges by the member and, therefore, does not cover a charge given by the builder or any other third party.

5. A guarantee, not being a guarantee given in pursuance of "a continuing arrangement" (below) accepted by the society with the written consent of the member and supported by a charge on money deposited with the society or trustee investments. In this case the guarantee and charge is given by a third party but any hardship to the purchaser and mortgagor is avoided by the requirement that his written consent is necessary.

6. A guarantee given in pursuance of "a continuing arrangement" which conforms to the requirements of Part II of the Schedule.

Before dealing with Part II of the Schedule reference must be made to Clause 2 (3) of the Act. This provides that where a guarantee of classes 2, 4, 5 or 6 (above) is given in pursuance of a continuing arrangement the advance shall not exceed 95 per cent of the purchase price, the "basic advance" (defined by Clause 9 as the maximum amount which the society would consider proper to advance if no collateral was given) shall not exceed 75 per cent thereof and accordingly the excess advance shall not exceed 20 per cent thereof. The only exception to this is where the Society add to the advance the amount of a single premium on a life policy for an amount sufficient to repay all sums due to the Society. In such a case the amount of this single premium does not have to be taken into consideration in calculating the amount of the advance or excess advance.

"Continuing arrangement" is defined by Clause 9 as any arrangement in contemplation of a series of advances whereby a person other than the purchaser undertakes to give to the society a series of guarantees to secure sums payable to the society in

respect of such an advance. It, therefore, covers the usual type of pooling agreement and also similar arrangements made between a building society and e.g. a housing association whereby the latter agree to guarantee excess advances made by the society. But although it covers the usual type of pooling agreement it only does so if the builder (or other third party) enters into guarantees as well as providing collateral security. This is not always done. Thus in one case known to the writer, a receiver of the assets of a building company appointed in a debenture holders' action entered into a pooling agreement under which he agreed to provide collateral security but refused to enter into any guarantees, which, indeed, the Court would probably not have authorised him to do. Such a case is not a continuing arrangement within the meaning of the Bill and, moreover, is not authorised under any of the heads of Part I of the Schedule. It is difficult to see why such a transaction should be penalised in this way. The only real protection to the society is furnished by the sums left in the pool and there seems to be no reason why the Legislature should insist upon guarantees being given in addition. As has been mentioned, there may be good reason why such guarantees should be refused.

It will be observed that not all continuing arrangements will have to comply with Part II. A charge or guarantee falling within heads 1, 2, 3 or 4 of Part I need not also comply with Part II. But all *guarantees* given in pursuance of a continuing arrangement must, unless they fall within head 3, comply with Clause 2 (3) of the Bill (above) dealing with the maximum advance and excess advance, and the minimum basic advance.

Continuing arrangements to which Part II applies must provide—

(*a*) That each guarantee will secure all sums which may become due to the society in respect of the relevant advance before the guarantor is released

(*b*) That the guarantor will not be released before the principal sum has been reduced to *two-thirds* of the purchase price

(*c*) That the guarantor will deposit in the pool as collateral security a sum which in the case of the first five guarantees shall be equal to the amount of the excess advance and in respect of each subsequent guarantee shall be equal to at least one-third of the excess advance

(*d*) That all sums in the pool shall furnish collateral security for sums due in respect of all advances made in pursuance of the arrangements being advances of which the

principal moneys have not been reduced to two-thirds of the purchase price

and

(*e*) That no withdrawal from the pool shall take place unless after withdrawal the pool shall be at least equal to—

(i) The amount by which the aggregate of the principal of the first five advances exceeds two-thirds of the aggregate of the purchase prices, and

(ii) one-third of the amount by which the aggregate of the principal of subsequent advances exceeds two-thirds of the aggregate of the purchase prices.

Compliance with these provisions may be waived by the Chief Registrar of Friendly Societies in the case of guarantees by government departments, public utility companies or recognised housing societies.

Grave exception to the proposals is taken by the builders, and with some justification. Taking the case of a house selling at £1000 upon which £950 is to be advanced—so far as the first five guarantees are concerned the whole of the excess £200 will have to be left in the pool and under (*c*) above will not be released for many years. It is understood that in the London area the average net profit on a reasonably built house selling at £1000 is about £80. So far, therefore, as cash is concerned the builder will be working at a loss. Admittedly the position improves after the first five guarantees but it must be some time before the builder is receiving a cash return for his outlay and in the meantime he will normally be paying about £5½ per cent on a mortgage of his property. Most builders sell under 50 houses each year, and on the figure given above the net profit on these would be £4000. But under Part II they will have to leave in the Pool, if in each case the excess advance is £200—

On the first 5 guarantees . . .	£1000
On the subsequent (say) 45 guarantees	£3000
Total .	£4000

Thus during the first year they will have obtained no return at all on their capital expenditure which will have had to be very heavy in order for them to have acquired the land and built 50 houses, and they will doubtless be paying mortgage interest. It is appreciated that the object of this part of the Bill is to protect the stability of building societies, the failure of which would be a social catastrophe which no government could permit. But

it is unfair that this should be at the expense of the building trade. The Government is presumably also concerned to discourage the profiteering jerry-builder and to encourage the genuine builder. Under these provisions, on the other hand, those builders who will suffer least are the builders who make a large margin of profit on their houses and the big financial concerns who are not unduly worried if their profits are tied up for some years: these are not necessarily the types which in the public interest should be encouraged. The genuine builder who has less financial backing but who is prepared to give the public something worth the price asked and who should be encouraged, may well be put out of business. Representations on these lines are being made to the Government with a view to persuading them to modify the proportions specified in Part II but at the time of writing it is not possible to say whether these will meet with success.

Attention must be drawn to Clause 10 (2) which provides that where a continuing arrangement has been made before the commencement of the Act, any guarantee and collateral security given pursuant to the arrangement within three months after the commencement of the Act shall be deemed to be authorised.

By Clause 3 where security is taken for any advance from any third party then before the contract to repay the advance is entered into, the society must give to the member a notice in writing in the form prescribed by the Chief Registrar of Friendly Societies (see Clause 9) stating whether the advance includes an excess advance and if so the amount thereof. If this written notice is not given no sums shall be recoverable in respect of the advance or of any security given therefor except by leave of the Court. This will apparently apply even to the enforcement of the collateral security against the builder or other third party since the clause refers to "any security given therefor (whether by the member or *otherwise*)." "Therefor" refers to "the advance" whereas the security of the third party will normally be given for the excess advance only, but the greater presumably includes the less. It might, however, be well if the intention were made clearer.

Upon the application to the Court for leave or upon an application by the member, the Court may re-open the transaction and make such order as seems just. This delegation of discretionary powers to the Court is in accordance with the trend of recent statutory legal reforms exemplified by such Acts as the Inheritance (Family Provision) Act, 1938, and the Leasehold Properties (Repairs) Act, 1938.

Where the principal sum exceeds £500 (or such other sum as is from time to time prescribed by Order in Council) the court having jurisdiction is the county court.

These provisions constitute a most desirable reform. No longer will it be possible for the purchaser to be ignorant that the builder is giving collateral and to think that the whole 90 or 95 per cent advance is being made on the house alone so that he is given an exaggerated idea of its value. Some of the building societies, of course, already take steps to see that the purchaser is fully informed. It should be noted, however, that the written notice only has to be given before the contract to repay is entered into; it need not be given before the contract to purchase is signed. Normally the two agreements are contemporaneous, but not always. The purchaser may, therefore, find himself committed to buy the house before he realises the true position. No doubt he would have a right to rescind if he had been misled by the builder as to the nature of the mortgage, but he might not realise his rights in this respect. It is submitted that it would be fairer if it were also expressly provided that where the builder has agreed either orally or in writing to arrange a mortgage for the proposed purchaser, no contract to purchase should be enforceable by the builder unless a similar written notice had been given before the contract was signed.

Miss Wilkinson's Bill contains provisions similar to Clause 3 but rendering the mortgage and collateral guarantee wholly unenforceable unless a statement as to the existence and nature of the collateral is set out in the mortgage.

Clause 4 (1) provides that where a society makes an advance to a member for the purpose of defraying the purchase price, the society shall be deemed to warrant that the purchase price is reasonable unless before the contract to repay is entered into they shall have given to the member a notice in writing stating that the making of the advance implies no such warranty. No doubt this notice will be given in all cases and here again the Bill is designed to give effect to the practice of many of the better societies who have for many years taken the precaution of giving such a notice, though it is doubtful how many purchasers have read it with understanding. Once again, the notice may not necessarily be given until after the contract to purchase is signed, and here too it is suggested that this contract should not be enforceable unless a similar notice is given before it is signed.

This question of warranties is a difficult one. Miss Wilkinson's Bill goes much further: It provides that wherever collateral

security is given, the society shall warrant that the house has been erected in an efficient and workmanlike manner, of good and substantial materials and in compliance with the local bye-laws, and that it is in all respects fit for human habitation. These warranties must be set out in the mortgage and the local authority is put under a duty of issuing a certificate setting out any matters which appear to constitute a breach.

There is no doubt that the position in the past has been unfair to the purchaser. He has often been led to suppose that the whole advance is being made on the security of the house and, as in the Borders case, exaggerated statements may have been made to him as to the society's opinion of the house. It is true that these statements will have been made by the builder and not the society, but, particularly where there is a pooling agreement, the financial connection between the builder and the society is close. In many cases, too, the society pay a commission to the builder on mortgages introduced (thus rendering the connection even closer) though this is to be rendered illegal in the future. Moreover, the building society make a survey of the house, for which the purchaser pays. It is clear, however, that at present the society give no warranties (though the builder, who may not be worth powder and shot, may do so either expressly or impliedly) and that their surveyor owes no duty of care to the purchaser. The societies object that they are not the builders and cannot be expected to guarantee the work of the latter, and that if they are to be liable to the purchaser for faulty or inadequate surveys they will have to charge the purchaser a survey fee considerably in excess of the two or three guineas at present charged. It is obvious that an adequate survey cannot be made at this price. In fact it is well known that where standardised houses are being erected the surveyors make a reasonably thorough inspection only of the first house to be finished but thereafter content themselves with seeing that the house is standing and is completed and decorated.

If an opinion may be expressed, it is suggested that to expect the building societies to enter into warranties goes too far. On the other hand, it is thought that their surveyors should be required to make their report both to the society *and to the purchaser* and in it to certify what they consider to be the true value of the house. If this would necessitate an increased survey fee most purchasers should be prepared to pay this if they realise that they would get something of real value to them. Moreover, the societies will reap substantial pecuniary benefits by the prohibition of payments of commission and they should be

prepared to give something in exchange. Such a provision would probably put the worst class of jerry-builder out of practice but would be no hardship (quite the contrary) to the genuine builder. Admittedly the Government's Bill goes some way to remedy the dangers of the present position, but not, it is submitted, far enough.

Clause 5 provides that: "Where a society has made an advance to a member upon the security of freehold or leasehold estate, it shall be the duty of the society in exercising any power to sell the estate as mortgagee thereof, to take reasonable care to ensure that the price at which the estate is sold is the best price which can reasonably be obtained; and any agreement, if and in so far as it relieves, or may have the effect of relieving a society from the obligation imposed upon it by this section, shall be void."

Provisions in pooling agreements requiring the builder to purchase from the society at a price equal to the amount outstanding on the mortgage if the borrower defaults are therefore to be definitely invalid. As previously mentioned, their legality has always been dubious. There will, however, be no objection to the builder obliging himself to take a transfer of mortgage.

Clause 6 contains the prohibition, already referred to, of the payment of gifts or commissions by a society to any person financially interested in the sale, letting or erection of the property or to any agent or servant of such person for the purpose of inducing him to introduce business to the society. Penalties of a fine not exceeding £500 in the case of the society and of a fine not exceeding £100 and/or of three months imprisonment in the case of their servants or agents are imposed for a breach of this clause.

By Clause 7 the duty is imposed on the directors of the society of seeing that the adequacy of the security is assessed by a competent, prudent and experienced person. Records have to be kept showing the valuation of the freehold or leasehold security, the name of the valuer, and particulars of any additional security. These records are to be open to inspection by the auditor or by any accountant or actuary appointed by the Registrar of Friendly Societies on the application of 10 members of the society.

Clause 8 applies to building societies s. 152 of the Companies Act, 1929, invalidating any rule relieving a director from the consequences of negligence, and s. 372 thereof, enabling the Court to grant relief to directors in certain circumstances.

The remaining clause of the Bill deals with interpretation, etc.

The excuse for this lengthy treatment of the subject is its great public importance. Nearly all houses of a value of between a few hundred pounds and two thousand pounds or more are now purchased through the building societies and almost £137,000,000 was advanced by them during the year 1937. Moreover, the growth of the building society movement has led to the purchase of houses by classes of the populace who twenty years ago would never have considered purchasing. The social importance of the subject can therefore hardly be exaggerated and the impending reforms require the most careful consideration from every point of view before they are finally put on the Statute-Book.

L. C. B. Gower.

SOME LEGAL CONSEQUENCES OF MARRIAGE BY NATIVE CHRISTIANS IN BRITISH AFRICA

Among Britain's exports to her colonies there is an invisible one that has attracted hardly any notice, even from lawyers. It is English law. When Englishmen went abroad to found a score of colonies in the nineteenth century, they almost invariably took with them not only the common law and equity, but also "the statutes of general application which were in force in England at the time the administration was created." At the same time, lest anyone perceive in this silent process symptoms of imperial arrogance, all the early Orders in Council, using the same phrases, enjoined lawyers and judges to apply native law and custom "so far as it is not repugnant to natural justice and morality."[1]

Of the complications produced by this conflict of laws, few are more impressive than those arising from the marriage of native Christians in all parts of British Africa. Having been converted to Christianity, a varying but never negligible number of Africans, usually among the educated minority and often men of property, are married by Christian rites or, much less frequently, by civil rites.

It has been repeatedly assumed by the Courts that the consequences of such a marriage should be regulated by English and not by native law. The mere fact that the parties were Christians and contracted a Christian marriage under the local Marriage Ordinance is taken to be "sufficient to show that it was their intention that the marriage contract and all the consequences flowing therefrom should be regulated exclusively by English law."[2]

In point of fact, however, neither the parties nor the missionary who performs the marriage ceremony would normally be aware of its legal implications, as is shown by the problems afterwards presented to the Courts.

The first question that arises is whether a native already married by native custom has the right to contract a Christian marriage and, conversely, whether one married by Christian rites can marry by native custom without committing bigamy. The question is no academic one; everywhere in Africa the natives are polygamous and converts to Christianity not seldom fail to live up to the moral standards legally implied in a monogamous relation.

Legislation has partly settled the matter in most of the tropical dependencies. In Nigeria,[3] the Gold Coast,[4] Tanganyika,[5] Kenya,[6] and Uganda[7] the Marriage Ordinance provides that a person married under it (and thus by English law) shall be incapable of contracting a valid marriage under any native law or custom. It is not clear if a marriage according to native custom is dissolved by a subsequent Christian marriage.

[1] For the references, see my article on "The Recognition of Native Law and Custom in British Africa" in *Journal of Comparative Legislation and International Law*, February, 1938.

[2] *Cessario* v. *Goncallo*, 1 Nigerian L.R. 41, distinguishing *Cole* v. *Cole*, 1 Nigerian L.R. 15.

[3] Laws, Cap. 68, s. 35.

[4] Laws, Cap. 105, s. 44.

[5] Laws, Cap. 92, s. 35.

[6] Laws, Cap 167, s. 36.

[7] Laws, Cap. 103, s. 37.

In Southern Rhodesia a marriage by native custom of a person previously married in church was held to be bigamous.[8] In Sierra Leone a marriage by native custom is, however, not recognised as a marriage which can lead to a charge of bigamy.[9]

These provisions imply a recognition that marriage by native custom is itself no less valid than Christian marriage. Perhaps they reflect the changing view that English law is taking of polygamous marriage as a foreign custom. It is still difficult to say how far the rigid view adopted seventy years ago in the classic case of *Hyde* v. *Hyde* would be maintained to-day, for the Judicial Committee of the Privy Council has certainly recognised the validity of polygamous marriages in countries where they are lawful, and it has upheld rights based on them.[10]

In South Africa, on the contrary, the Courts have in the past refused to recognise marriage by native custom on the ground that a polygamous union is repugnant to Christian standards or civilised principles.[11]

They have withheld recognition whether the native had in fact taken a second wife or not.[12] Incidentally, these decisions were made in dealing with the question whether the evidence of a native woman, married in accordance with native custom, is admissible against the man. That depends on whether she is to be regarded as his lawful wife. If she is, the evidence is not admissible; if she is not, then it is. Yet in British colonies where native polygamous marriages are recognised, the evidence of a woman so married has been admitted against the man.[13]

Subsequent legislation in South Africa has, however, drawn a clear distinction between marriage, i.e. under the common law (which is Roman-Dutch), and "customary unions," i.e. marriages according to native custom, which are now implicitly recognised.[14] During the subsistence of a customary union, a native may contract a marriage, which apparently has the effect of dissolving the customary union; but a native who is married may not contract a customary union without running the risk of prosecution for bigamy.[15]

It follows from the fact that a marriage by Christian rites is a marriage under the common law that a native thus married can be divorced only on the grounds available under common law or statute.[16] But the statutes are only those "of general application which were in force in England" at the date when the Administration of the new colony was created. Subsequent statutes do not automatically apply to the colony. The wider grounds of divorce established by the Matrimonial Causes Act, 1937, will therefore not be available in Africa until such time as similar legislation may be passed in any colony itself.

What effect has Christian marriage on the property of the spouses? This question often arises and in several dependencies legislation has attempted to answer it.

[8] *R.* v. *Kaodza*, [1912] S.R.6.

[9] Christian Marriage Ordinance, 1924 (Cap. 25), s. 16.

[10] See an article by W. E. Beckett on "The Recognition of Polygamous Marriages under English Law" in *Law Quarterly Review*, July, 1932.

[11] *Nalana* v. *Rex*, [1907] T.S. 407. Cf. *Seedat's Executors* v. *The Master*, [1917] A.D. 302, especially at p. 308.

[12] *R.* v. *Mboko*, [1910] Transvaal S.C., 445.

[13] *R.* v. *Robin*, 12, Kenya L.R. (1929), 134 and *R.* v. *Mwakio Asani*, 3 Tanganyika L.R. (1931–4), 66.

[14] Native Administration Act, 1927, as amended in 1929, s.22.

[15] In Natal it is definitely bigamy under Law No. 46, 1887, s. 13.

[16] *Ellen* v. *Jim*, [1931] S. Rhodesia L.R., 118.

In the Gold Coast a curious compromise prevails and one does not envy the official whose duty it is declared to be to explain to natives who are about to marry the following provisions[17] in regard to succession in case of intestacy—

"The personal property of such intestate, and also any real property of which he might have disposed by will, shall be distributed or descend in the following manner, viz.—

"Two-thirds in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates in force in England on the 19th November, 1884, any native law or custom to the contrary notwithstanding: and one-third in accordance with the provisions of the native customary law which would have obtained if such person had not been married under this Ordinance. Provided—

"(1) That where by the law of England, any portion of the estate of such intestate would become a portion of the casual hereditary revenues of the Crown, such portion shall be distributed in accordance with the provisions of the native customary law, and shall not become a portion of the said casual hereditary revenues;

"(2) That real property, the succession to which cannot by the native customary law be effected by testamentary disposition shall descend in accordance with the provisions of such native customary law, anything herein to the contrary notwithstanding.

"Before the registrar or a marriage officer issues his certificate in the case of an intended marriage, either party to which is a person subject to native law or custom, he shall explain to both parties the effect of these provisions as to the succession of property as affected by marriage."

In Sierra Leone it is provided[18] that a Christian marriage, to which one of the parties is a native, "shall not have any effect on the property of such natives: Provided that nothing herein contained shall have the effect of preventing the parties to such marriage from coming to an agreement with respect to the control and enjoyment of their respective properties or of preventing such parties from disposing, by legal procedure and means, of their respective properties after their respective deaths.

"The property of parties to a marriage celebrated under this Ordinance shall, if both be natives, be subject in all respects to the laws and customs of the tribe or tribes to which the parties respectively belong."

In Nyasaland a marriage by Christian rites does "not alter or affect the status of the parties or the consequences of any prior marriage entered into by either party according to native law or custom or involve any other legal consequences whatever."[19]

In South Africa it is now provided[20] that, "during the subsistence of any customary union, no marriage shall in any way affect the material rights of any partner of such union, or any issue thereof, and the widow of any such marriage, and any issue thereof, shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union."

But during the subsistence of a customary union, no native can marry

[17] Marriage Ordinance (Cap. 105), 1909, as amended in 1935, s. 48.
[18] Christian Marriage Ordinance, 1924, Cap. 25, s. 26.
[19] Native Marriage (Christian Rites) Ordinance (Cap. 82), 1923, s. 3.
[20] Native Administration Act, 1927, as amended in 1929, s. 22.

unless he has first declared on oath before the magistrate or native commissioner of the district in which he is domiciled, the nature and amount of the movable property (if any) allotted by him to his wives and children under the customary union.

It is further provided[21] that all movable property belonging to a native and allotted by him or accruing under native law or custom to any woman with whom he has lived in a customary union, shall on his death devolve and be administered according to native law and custom. All other property of whatsoever kind shall be capable of being devised by will.

In Natal it had indeed long ago been enacted that no marriage between natives should "remove the parties from the operation of native law, either in their persons or their property."[22]

In Southern Rhodesia it has been enacted[23] that Christian marriage "shall not affect the property of the spouse which shall be held, may be disposed of, and unless disposed of by will shall devolve according to native law and custom."

This provision clearly contemplated that the property of a native dying intestate should devolve according to native custom, but that such property might be distributed otherwise in accordance with a will made by a native. Although the right to make a will is not known to native law, one is sometimes made by a native who has been influenced by European ideas, especially after he has acquired rights or interests unknown to native law or custom. Where a claim was based on such a will, it was contested on the ground that a native could not by will vary the distribution of his property according to native law. Another complication was the fact that the property in question was land, individual ownership of which was also unknown to native law. The Court held[24] that native law cannot serve as a guide in determining succession to property, the ownership of which was unknown to the native social structure. This was the decisive factor. Such ownership must be governed by the ordinary law of the land, and Section 13 of the 1917 Ordinance (quoted above) did not apply to it.

That this decision must not be taken to mean that a consequence of Christian marriage is inevitably the full application of the common law to the rights of the parties, was emphasised in the following year. A passage from the judgment in the case[25] sufficiently indicated the prevailing confusion. "There are exceptions of course in the application of native law. . . . Various incidents of a civilised marriage have been applied to natives inconsistent with native law and custom. Such are the emancipation of a woman on marriage from the power of her guardian (*Rex* v. *Gutayi*, [1915], S.R. 49), the incidents of claiming damages for adultery (*Iden* v. *Philemon*, [1918], S.R. 140), the repudiation of the wife by the husband (*Sikwela* v. *Sikwela*, [1912] S.R. 168), and the power of the Court to deal with the custody of the children (*Dayimano* v. *Kgaribaitse*, [1931] S.R. 134). But in the case of *Duma* v. *Madidi*, [1918] S.R. 59), the native law of inheritance and guardianship was enforced, and in *Chiduku* v. *Chidano*, [1922] S.R. 55) the law of guardianship according to native custom was also enforced. In the latter case, Tredgold, S.J., expressed the view, with which I agree, that native customs should not be interfered with unless they inherently

[21] *Ibid.*, s. 23.
[22] Law No. 46 of 1887, s. 11.
[23] Native Marriage Ordinance, No. 15, of 1917, s. 13.
[24] *Komo and Leboho* v. *Holmes*, [1935], S. Rhodesia L.R. 86.
[25] *Vela* v. *Mandinika and Magutsa*, [1936] S. Rhodesia, L.R. 171.

impress us with some abhorrence, or are obviously immoral in their incidence. The case of *Komo* v. *Holmes*, then, must be confined strictly to its subject-matter, which is the ownership and devolution of immovable property, a matter which falls outside the purview of native law and custom."

Recent legislation[26] has attempted to clarify the position by simply depriving natives of the benefits of "the statute law of the colony relating to the age of majority, the status of women, the effect of marriage on the property of the spouses, the guardianship of children, or the administration of deceased estates." The object of this enactment is apparently to restore native law and custom in those spheres and to prevent the Courts from exercising their discretion as in *Komo* v. *Holmes*.

The conclusions that emerge from this summary survey seem to be these. The rule that, in the absence of legislation, Christian marriage automatically involves the application of English (or Roman-Dutch) law, produces a crop of problems. Of these the worst is the case of the native who is partly Europeanised in his habits, and to whom the inflexible application of either native law or European law is likely to cause serious hardship. The legislation designed to deal with either the rule or its consequences varies widely from one colony to the next. Even neighbouring territories have treated the same problem quite differently and without consulting each other's experience.

A desirable rule to be followed in the difficult cases of natives who are partly Europeanised was laid down in an old leading case[27] in Nigeria—

"The Court is not bound to observe native custom in *every* case where the custom is not repugnant to natural justice, etc., nor incompatible with any local Ordinance. When the Court has before it a matter which is purely 'native,' or where all the circumstances to be taken into account are connected with native life, habit, or custom, then, undoubtedly native law and custom should apply. Where, on the other hand, the matter before the Court contains elements foreign to native life, habit, and custom, the Court is not bound to observe native law and custom."

In present circumstances it is obviously unwise for legislation to fetter the discretion of the Court in such cases.

JULIUS LEWIN [28]

[26] Native Law and Courts Act, No. 33, of 1937, s. 3.
[27] *Cole* v. *Cole*, [1898] Nigerian L.R., Vol. 1, p. 15.
[28] Lecturer, University of Capetown.

STATUTES

Inheritance (Family Provision) Act, 1938

In view of the thorough consideration given to the subject-matter of this Act in Volume I of this Review at page 296 (to which the reader is referred), it will be sufficient here briefly to summarise its effect.

The Act does not come into operation until the expiration of one year from the date of its passing (13th July, 1938), and only applies to a person who dies domiciled in England after the passing of the Act, and who leaves a will. In such a case the Court has power to order payment of reasonable provision out of the net estate of the testator for the benefit of (*a*) a surviving spouse, (*b*) a son who is an infant or by reason of some mental or physical disability incapable of maintaining himself, or (*c*) a daughter who has not been married or who is under such a disability. An order may be made if the Court is satisfied that the will does not make reasonable provision for the maintenance of that dependent and can be subject to such conditions or restrictions as the Court may impose. But no application can be made to the Court for the exercise of the power if not less than two-thirds of the income of the net estate has been bequeathed to a surviving spouse and the only other dependents are children of the surviving spouse. Moreover, unless the net estate does not exceed £2000, the provision for maintenance can only be by way of periodical payments of income which must terminate not later than remarriage in the case of a surviving spouse, marriage or the cesser of the disability (whichever is the later) in the case of a daughter, and attainment of full age or cesser of the disability (whichever is the later) in the case of a son, or, in any case on the death of the dependent. Further, the amount of the annual income applicable for the maintenance of dependents at any one time is not to exceed two-thirds of the annual income if the testator leaves a spouse and one or more dependents, or one-half if the testator does not leave a spouse or leaves a spouse and no other dependents (s. 1 (3)).

Where the total net estate does not exceed £2000 the Court may order provision in whole or in part by payment of capital but the Court in determining the amount shall give effect to the principle of s. 1 (3) *supra*.

In the exercise of its discretion the Court is to have regard to the nature of the testator's property and is not to order a provision which would necessitate an improvident realisation of the property, and is also to take into consideration the testator's reasons, so far as ascertainable, for making the dispositions contained in his will. The Court may accept such evidence of these reasons as it considers sufficient, including any statement in writing signed by the testator and dated, but in estimating the weight to be attached to this statement the Court is to have regard to all the circumstances. This provision as to evidence is not entirely clear. The commencement at first sight appears to provide that the Court may have regard to any evidence whether or not this would be admissible under ordinary principles of the law of evidence. The latter part, however, suggests that statements by the testator are not admissible unless in writing and signed and dated.

By s. 2 of the Act an application to the Court must be made within 6 months from the date on which a general grant of representation is taken out and a "dependent" under the Act is deemed to be a person interested in the estate for the purpose of obtaining a grant of representation.

Where an order is made the will is deemed for all purposes (*including*

death duties) to have had effect from the testator's death as if it had been executed with the variations specified in the Order, and the Court may make consequential directions for the purpose of giving effect to this order. An office copy of the order is to be sent to the principal probate registry and a memorandum of it is to be endorsed on the grant of representation.

Notwithstanding s. 2, after the expiration of the 6 months period an application may be made for an order varying a previous order on the ground of material non-disclosure or substantial change of circumstances, or for an order making provision for the maintenance of another dependent, but such an order can only relate to property the income of which is at the date of the application applicable for the maintenance of a dependent.

For the purposes of the Act "son" and "daughter" include a legally adopted or posthumous child. But an illegitimate child is not included.

The Act, which is obviously of first-rate importance both legally and socially, follows the same general lines as legislation in other parts of the British Empire (for a comparative survey of the New Zealand legislation, see the note in Vol. I, p. 296) and no doubt the principles enunciated in the decisions of the Courts of the Dominions will be found useful by the Courts of this country. But so far as English Law is concerned, the Act represents an entirely new development, and it differs from the corresponding legislation in the Dominions in that the discretion which it confers upon the Court is very severely limited. It might have been better if the Legislature had been prepared to place a little more trust in the common-sense, fairness, and intelligence of the Judges; on the other hand, it must be admitted that the attitude adopted by some judges towards certain recent reforming legislation is not best qualified to encourage such trust.[1] In any case, the limitations imposed may have the desirable effect of securing uniformity in the exercise of the discretion. It remains to be seen what use will be made of the Act, what effect it will have on family life, and whether it will result in a diminution of the most unpleasant actions to set aside wills on the grounds of insanity and undue influence or whether it will add to or substitute for these another opportunity for washing dirty linen in public.

The above is merely a summary of the provisions of the Act and the reader is referred once more to the notes in Volume I and to the terms of the Act itself.

REPORTS OF COMMITTEES

Report by the Committee of the International Chamber of Commerce on the Legal Treatment of Foreign Companies

The business man's most effective reply to a prohibitive tariff is to produce behind the tariff wall, and mounting tariffs throughout the world have resulted in the setting up of branches and subsidiaries of companies in one country in the territories of foreign countries. "Tariff barriers," it has been said[1a], "have had the paradoxical effect of discouraging the export of commodities only to stimulate the exportation of factories." This trend has given enhanced importance to the question of the legal

[1] On the other hand, it is clearly the modern tendency of reforming legislation to confer a discretion (more or less limited) on the Courts. See also the Leasehold Property (Repairs) Act, noted in *Modern Law Review*, Vol. II, p. 160.

[1a] P. Baudouin-Bugnet, "Fair Play for Foreign Companies," *World Trade*, Vol. X, No. 3, p. 7.

and fiscal status of companies and their subsidiaries in foreign countries. Unfortunately nationalist sentiment which is playing so dominant a rôle in post-War Europe has found expression, not only in the exclusion of foreign products, but also in a shortsighted policy of placing difficulties in the way of setting up branches and subsidiaries of foreign companies in the national territory.

This subject has in recent years been the subject of careful investigation by an expert committee of the International Chamber of Commerce. As a result of this investigation the International Chamber has produced a Draft Model Bilateral Agreement[2] designed to facilitate the setting up and operation of subsidiaries and branches in foreign countries. It is not only in the sphere of foreign affairs that collective bargaining has proved abortive and the Chamber recognises that the method of bilateral negotiation holds out most hope of material progress. The Draft, therefore, is intended to serve as a basis for bilateral agreement between one government and another.

The first difficulty which had to be faced was to establish a criterion for determining the "nationality" of companies for the purposes of the agreement. Two alternatives were propounded. In the first place, there was the criterion of the situation of the legal seat (i.e. where the company is registered or where its bye-laws declare it to be constituted, etc.). This criterion was rejected as being open to abuse[3], since a company might attempt to set up a fictitious seat in order to benefit by more favourable treatment. The second alternative was the situation of the "principal establishment." The difficulties in this case were of a strictly practical kind. In the case of a large undertaking it may be difficult to determine the location of its "principal establishment" in the sense of principal centre of operations.

The solution adopted by the Committee is to propound a definition as a model which may, nevertheless, be varied as a result of negotiations between the High Contracting Parties with special reference to their own legal systems.

For the purposes of the agreement all associations of persons and/or capital[4] having their seat in the territory of one of the High Contracting Parties and doing business legitimately for profit are deemed to be companies of that Party by the other High Contracting Party[5]. The seat for this purpose is "the place where the real centre of management is "situated."[6] This in effect is the criterion adopted by the English Courts for determining the domicil or, to be more accurate, the quasi-domicil of corporations[7]. It is a question of fact in any particular case where the real control is exercised. Of this doctrine Lord Atkinson has said[8]—

> "If the true rule be that the residence is where 'the central management and control abides' then, unless a thing can have two or three different and separate centres, it would appear to me to be quite impossible, according to the ordinary use of language, that 'the central control and management' can at the same time abide in two or more different places."

[2] *Ibid.*, pp. 8–10.
[3] Draft Agreement, Art. 2, Commentary.
[4] Thus the word "company" as used in the agreement is not confined to associations which constitute a company according to English law.
[5] Draft Agreement, Art. 1.
[6] *Ib.*, Art. 2.
[7] *Cesena Sulphur Co.* v. *Nicholson* (1876), 1 Ex.D, 428; *cf. Egyptian Delta Land & Investment Co.* v. *Todd*, [1929] A.C. 1, 19.
[8] *Swedish Central Railway Co.* v. *Thompson*, [1925] A.C. at p. 508.

Dr. Cheshire, in the first edition of his work on Private International Law[9] concedes that the logic of this argument is unanswerable. It is true that later cases have introduced some uncertainty into this doctrine. But these cases have been concerned with *residence* for specific purposes. Thus for purposes of jurisdiction[10] and for the purposes of the Income Tax Acts[11] a corporation may be regarded as resident in two or more places. "But the fact remains," says Dr. Cheshire[12], "that if it is necessary to determine the domicil of a corporation as distinct from its residences the place of central control furnishes a reasonable and comparatively simple test." In the same way the criterion suggested in the Agreement does provide a certain and unambiguous standard, whatever refinements it may be necessary to consider in questions of jurisdiction or taxation. In the *Cesena Case*, for example, the company was incorporated under the Companies Act (though later registered in Italy) for the purpose of taking over and working sulphur mines at Cesena in Italy. The practical business of manufacturing and selling the sulphur was administered by an Italian delegation including the managing director who was permanently resident at Cesena. No products were ever sent to England, the books and accounts were kept in Italy, and two-thirds of the shareholders were resident Italians. So far it appeared that the centre of *business* was in Italy. But the articles of association showed that the objects of the company included the acquisition and working of sulphur mines, not only in Italy, but at any place where sulphur was likely to be found. There was a Board of Directors which met in London and which had "sole order, direction and management" of "the working of the company's mines, the mode of disposition thereof, and the general business of the company." Shareholders' meetings were held in London and it was there that the dividends were declared. Here, then, the effective administrative control was in London and the company would be an English company within Arts. 1 & 2 of the Draft Agreement. With this case we may usefully compare the case of *Swedish Central Railway Company* v. *Thompson*[13] which decides that, for purposes of income tax a company may have more than one residence. A company was formed in England in 1870 with the object of constructing and running a railway in Sweden. In 1900 it leased the railway to a traffic company for 50 years at an annual rent of £33,500 payable in England. In the same year the articles of association were altered so as to remove the control and management of the business to Sweden, and after that time the general meetings of the shareholders (who were mostly Swedish) and the meetings of directors were held at Stockholm. Dividends were declared there, and no profits were transmitted to England except in the shape of dividends to English shareholders. On the other hand a committee which met regularly was appointed in London to deal with transfers of shares in the United Kingdom, to attach the seal to share certificates and to sign cheques on the London banking account. By a majority decision the House of Lords held that a company is capable of a dual residence for income tax purposes and that the company in this case was sufficiently resident in this country to be assessable for income

[9] At pp. 124, 125.
[10] *Carron Iron Co.* v. *Maclaren*, 5 H.L.C. 416, 449; *New York Life Insurance Co.* v. *Public Trustee*, [1924] 2 Ch., at p. 120.
[11] *Swedish Central Railway Co.* v. *Thompson*, [1925] A.C. 495.
[12] *Op. cit.*, 2nd ed., p. 204.
[13] *Supra.*

tax. Nevertheless, no difficulty arises in applying to this case the definition in the Draft Agreement. It was admitted that the controlling power of the business was in Sweden, the real centre of management was there, and for the purposes of the Agreement it would be a Swedish company.

Companies of each of the High Contracting Parties so defined have the right to do business in the territory of the other High Contracting Party by setting up branches and/or subsidiaries subject to the same authorisations and conditions as shall be required for companies of that Party[14], and in no case shall the "nationality" of the company affect the grant of the authorisations demanded.

Such branches and subsidiaries when established have the same rights and powers as similar national undertakings subject, of course, to compliance with the national law. In particular, it is provided that they may appear in Court as plaintiffs and defendants, acquire land and buildings, participate in public tenders and be concessionaries of public services.[15] This provision cannot be read without qualification. In the first place, presumably, a branch or subsidiary would not be able to appear as plaintiff or defendant in legal proceedings unless it was an entity endowed with legal personality. Secondly the general power to acquire and hold land must be read subject to the earlier paragraph which equates the legal position of subsidiaries and branches with that of national undertakings. Read literally and without this qualification the article might have the effect of putting such branches and subsidiaries in a privileged position in this respect.

Tenders for supplies or concessions of importance to national defence "properly so called" may be reserved at the discretion of each of the High Contracting Parties[16]. This clause will be a fertile source of controversy. It is obviously very difficult to say in modern conditions where national defence—even "properly so called"—begins or ends. Nevertheless, the functioning of an agreement on these lines must always depend upon a strict adherence to the spirit of its provisions and on a spirit of mutual co-operation in the interpretation of its terms.

Articles 6 and 7 define the terms "branch" and "subsidiary." A branch must satisfy the following conditions—

1. It must be a permanent establishment, a term which includes the installation and fixed places of business of an enterprise, such as mines, oil-wells, plantations, factories, workshops, warehouses, offices and agencies. It does not include an agent of genuinely independent status, as a broker, commission agent, etc., but it does include an agent who is (*a*) a duly accredited agent (*fondé de pouvoirs*) who habitually enters into contracts for the enterprise for which he works, and (*b*) is bound by an employment contract and habitually transacts commercial business on behalf of the enterprise in return for remuneration from it, and (*c*) is habitually in possession of goods belonging to the enterprise, if this is implied by the nature of the trade or industry in question[17].

2. It must be without separate legal personality.

3. It must be directly dependent financially and/or administratively on a company of the other High Contracting Party. It is doubtful whether

[14] Art. 3.
[15] Art. 4.
[16] *Ibid.*
[17] *Cf.* Protocol, League of Nations Draft Convention for Allocation of Business Income between States for purposes of Taxation, C. 252. M. 124, 1933, II, A. See *World Trade, ubi supra*, p. 9.

the alternative form would do since if the dependence were financial only then the questions might arise as to whether the "seat" of the business was not in the country where the so-called "branch" operates.

4. It must have the same—or having regard to difficulties of translation, substantially the same—description as the principal company.

5. Its activity must be within the limits of the objects of that company.

6. It must be under the direction of an appointee of the parent company, with powers to represent it and contract on its behalf.

"Subsidiaries" are defined as companies situated on the territory of one of the High Contracting Parties which, although having a separate legal existence and property, with separate management and direction, are nevertheless subordinate financially and/or administratively and/or technically to one or several Companies situated on the territory of the other High Contracting Party. The same caveat to the alternative form must be entered here as is suggested in (3) above.

Articles 8 and 9 attempt to prevent restrictions based on the nationality of founders, directors, shareholders, partners, or employees in the undertakings concerned. Technical specialists and executive staff of the nationality of the parent company may be employed without restriction. As regards employees of a third nationality, branches or subsidiaries of a foreign company must conform to the laws in force in the state where they operate. Nationality of course cuts across the boundaries of race and it may be found impossible to negotiate with the authoritarian states on the basis of nationality. This consideration probably dictated the proviso that the only exceptions admitted to these articles are those based on public policy or the security of the State.

Article 10 provides that no restrictions shall be placed on the transfer from the country of one of the High Contracting Parties to that of the other of monies resulting from profits made or capital invested in their subsidiaries or branches by the companies of each of the High Contracting Parties in the course of business done in the territory of the other High Contracting Party. In present conditions, having regard to the rigid exchange controls operated by a number of countries, this provision can be no more than a pious hope for the future.

Article 11 contains a general prohibition of fiscal discrimination, and articles 12 & 13 provide for consultation between the parties and for a time limit for the operation of the Agreement.

E. Wyndham White.

Report of the Committee on Repair of Premises damaged by Hostilities[1]

Space does not permit of a detailed examination of the recommendations of the Committee, which include in a Schedule a Scheme in a form similar to a draft Bill. Accepting the basis, on which the Committee has proceeded, the report is nothing if not thorough, but its recommendations appear to fall largely into three groups, namely, first, the relations between landlord and tenant where the head lease is not a building lease at a ground rent; secondly, the same relations where there is only a ground rent; and thirdly, the relations between mortgagor and mortgagee. Other rights included in the report are those associated with fee farm rents, mining leases, agricultural leases, settled property and ecclesiastical property.

[1] Cmd. 5934, printed by H.M. Stationery Office. Price 6d.

Although a scheme is recommended, others are shortly discussed and dismissed as unsatisfactory.

The basis upon which the Report proceeds is that there can be no form of insurance against war risks. The companies have already excluded these risks and it is assumed that in view of the uncertain character of the extent of risk the Government is not willing to assist in a manner similar to that already announced in connection with shipping. Faced with this position the Committee have sought to find a *via media* for the regulation of the rights of individuals so that the loss, if any, arising from destruction of buildings shall fall upon the person designated independently of contractual obligation. It may be emphasised at the outset that the recommendations are intended to apply independently of the date of the creation of the rights and of any express contract to the contrary.

Regarded as a piece of social legislation it is interesting because the State is apparently prepared to disclaim responsibility for loss arising from circumstances affecting, and in the interests of, the whole community but is willing to determine the rights of private persons despite their contractual obligations. This seems to carry State interference to considerable lengths but is justified on the ground that lessors and lessees and mortgagors and mortgagees are not strictly upon terms of equality. If this principle is sound, and every practical lawyer must have some sympathy for it, it may justify other interference than that already attempted apart from such exceptional circumstances as war risks.

The distinction drawn between the three principal classes mentioned above appears to be as follows. Where the lease is not at a ground rent the property virtually belongs to the lessor and provides him with his income by way of rent, hence if the property is destroyed the loss should fall upon the lessor and not upon the lessee, who by disclaimer can get rid of liability not only to repair but also for payment. Where the lease is at a ground rent the building primarily belongs to the lessee and the site to the lessor. The lessee is, therefore, to bear the loss of the building but to continue liable to pay rent and otherwise observe the covenants apart from the covenant to repair. The lessor may lose any enhanced value of the site by the loss of the building. The position of mortgagors and mortgagees is somewhat different, and is more analogous to that arising from the grant of a fee farm rent. The mortgagee has only a security and therefore has no property strictly to destroy. The mortgagor is to be relieved of his liability to repair, but the obligation to repay remains unimpaired. Similarly the owner of a fee farm rent retains his right to rent but is not to be able to compel repair of premises. Here the loss will in fact fall upon the owner of the property if he is otherwise solvent and upon the lender or owner of the rent, if he is not. It should be added that this short and blunt statement of the recommendations hardly does justice to the modifications and safeguards which are added to the Report, as, for example, the suggestion that leave to apply to the Court to disclaim might be given to lessees where the rent is more than the site value of leases at a ground rent. There are also important questions of discretion to be exercised by the Courts.

We have selected this method of statement, however, to bring out what we believe to be the essential feature of these recommendations. The substantial owner of property is to bear the risk of loss by war risks and is not to be able by contract to escape from this liability. In fact it places the owner of property that is let in an analogous position to that of the

occupier owner. Why the mortgagee should be exempted from loss, except by the insolvency of his debtor, is not equally clear. The mortgagor, if anything, has more at stake than anyone else, since the destruction destroys more than his asset since it increases his liability. This seems to be an extension of the principle.

If this principle is sound, namely, that a war waged on behalf of the community should entail specific risks to property owners it is right that it should be considered as a whole and not with regard to one form of property only. Housing a community is almost as essential as feeding it and possibly more important than transporting it. Owners of land differ from owners of movable property in that they cannot protect it by removal. If anything, therefore, property owners should receive a special measure of consideration. In fact, they are to be told that nothing they can do will lessen a risk which they must bear. So soon as their property ceases to fulfil its function in part or whole (as in the case of flats or workrooms) such loss in part or whole is to be borne by them. We would like to know whether similar rules are to be laid down, for example, with regard to vehicles used in transport and irrespective of agreements for maintenance and repair. Again, upon whom is to fall the loss for property held under a hire-purchase agreement?

In our view the matter before this Committee was too limited in scope. If the legislature is to interfere in such a matter with the contractual obligations of individuals, and probably interfere it must, then such interference should be based upon some general principle clearly ascertained and applied to property rights generally. No doubt there is a general principle of the Common Law affecting damage done by Act of God or the King's Enemies that the loss should fall where it lies, but this principle is based on the Common Law which generally preserves the freedom of contractual obligation. The legislative action proposed is a restriction upon Common Law principles except in so far as it may plead "public policy." If such restriction is based upon "public policy" then such "public policy" should be defined. Having been defined it should, as the Common Law is, be applied generally.

H. Potter.

NOTES OF CASES

Private International Law : Contracts

English Private International Law has entered what future legal historians may call one of its formative stages. The great decision of the House of Lords in *R.* v. *International Trustee*, [1937] A.C. 500, and the judgment of the Privy Council in *Mount Albert Borough Council* v. *Australasian Temperance Society*, [1938] A.C. 224, are milestones on the road towards a systematisation of the rules of conflict of laws applying to contracts. They are even surpassed in importance by the recent decision of the Privy Council in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* (*in liquidation*), [1939] 1 All E.R. 513. This case is the greatest contribution to clarity in this field which the Courts have made for a long time and it is incidentally of outstanding commercial importance. It was a decision rendered by the Privy Council as the highest Court for the Province of Nova Scotia. Yet, there can be no doubt that it has a fundamental effect on English Private International Law.

The defendants were a company incorporated under the laws of Nova Scotia. They were the owners of a ship in which a cargo of herrings was consigned from a Newfoundland port to the plaintiffs, a company incorporated in New York. The plaintiffs were at all material times the owners of the cargo and holders of bills of lading issued on behalf of the defendants in Newfoundland. They sued the defendants for damages on the ground that the cargo had been injured in transit through the negligence of the master. The bills of lading contained a clause relieving the shipowners of liability for loss due to the negligence of their servants. They also contained a provision to the effect that they should be subject to the terms and provisions of, and exemptions from liability contained in, the Canadian Water Carriage of Goods Act, 1910, and specially incorporated a clause of that Act which declared illegal, null and void any clauses exempting shipowners from liability save in accordance with the provisions of the Act. Finally, the bills of lading expressly provided that "this contract shall be governed by English law." In 1932, there came into force in Newfoundland the Carriage of Goods by Sea Act, which embodies the Hague Rules in a Schedule and is virtually identical with the English Carriage of Goods by Sea Act, 1924. S. 3 of the Act, like the analogous section of the English Act, provides that every bill of lading or similar document of title issued in Newfoundland which contains a contract to which the Rules apply shall contain an express statement that it is to have effect subject to the Rules. When the bills of lading were issued by the defendants' representative he inadvertently used old bill forms which did not contain the reference to the Hague Rules.

It was this latter fact which gave rise to the dispute. The plaintiffs contended that the bills of lading, as they did not comply with the provision in s. 3 of the Newfoundland Act of 1932, were illegal according to the law of Newfoundland, and that on this ground the exemption clause in the bills could not operate in favour of the defendants. The Nova Scotia Courts rejected this contention and gave judgment for the defendants. The Judicial Committee affirmed the decision of the lower Courts. The problem whether the bills were illegal by the law of Newfoundland, i.e. the *lex loci contractus*, and, if so, whether this illegality could affect a contract, expressly subjected to English law, and now the object

of litigation in the Courts of Nova Scotia, gave Lord Wright who delivered the judgment an opportunity of elucidating some of the most fundamental problems of Private International Law.

I

The first question to be decided was: What was the proper law of the contract? The parties had agreed that the contract was to be governed by English law. Yet, there was no visible connexion between the subject-matter of the contract and England. Were the parties to a contract of carriage of goods from Newfoundland to New York at liberty to choose English law as the proper law of their contract, though neither of them was an English company? Was such a choice "to be taken seriously"? In legal theory the question is highly controversial, as to whether the parties to an international contract are free to choose whatever law they like, or whether there must be a "real connexion" between the contract and the law chosen. This question is answered in an unambiguous way by Lord Wright. According to the Private International Law of Nova Scotia, which can be taken to be identical with that of England, the "autonomy" of the parties is not so restricted. This is at least the case if the parties choose English law as the proper law.

This rule which has never before been laid down by the Courts is of very great practical importance indeed. It is an expression of a tendency which may be called "the expansion of English commercial law." In view of the fact that mercantile transactions all over the world are insured and financed in the City of London English commercial law has become of world-wide importance even in connexion with transactions which do not touch England at all. A parallel development can be found in those rules which extend the application of "English Maritime Law" to collisions on the high seas, wherever they happen and whatever are the countries to which the vessels concerned belong. The gradual elimination of the law of the flag and its replacement by the law which the parties may be deemed to have intended to govern their maritime contract works in the same direction. Lord Wright observes in his judgment that English arbitration clauses are contained in many foreign contracts of sale, that the underwriters of a cargo like the one forming the subject-matter of the present dispute are likely to be English, that the parties are likely to be familiar with English commercial law, and finally that an Imperial Statute, the Merchant Shipping Act, governed the transactions. All these points tend to show that the rule thus evolved by the Court is a corollary of the attraction which English law increasingly exercises on foreign commercial transactions. The favour thus shown to a choice of English law cannot have been uninfluenced by the fact that the rule now laid down is likely to lead to an application of English law by an English judge.

Though it is not necessary that there should be any real connexion between the law chosen and the contract itself, the "autonomy" of the parties cannot be entirely unfettered. Lord Wright mentions two possible restrictions. One is that the intention expressed must be *bona fide* and legal, the other that there must be "no reason for avoiding the choice of law on the ground of public policy." These two restrictions are quite different. The first refers to the act of selection, the second to the result to which the selection leads. If the choice of law is disregarded because it was not *bona fide* and legal, the Court refuses to apply the foreign law not on the ground that it is in any way objectionable, but because the

parties selected the foreign law in an illegal way. This exception seems to introduce into English law for the first time the French notion of *fraude à la loi*, the principle that if the facts of the case have been connected with a system of law by way of evasion, that foreign law will not be applied. The second qualification, however, suggested by Lord Wright, is the well-known principle of public policy. Foreign laws which shock the conscience of an English Court will not be applied in this country. Thus, the first of the two qualifications may lead to a refusal by the Court to apply English law if the choice of English law was made *mala fide*, but the second restriction can never operate where the law selected by the parties is English law itself.

II

The bills of lading, which had thus been submitted to English law by the parties, mentioned the Canadian Water Carriage Act, and it was alleged by the plaintiffs that this constituted a reference to Canadian law which invalidated the selection of English law as the proper law of the contract. This contention was rejected, but it gave Lord Wright an opportunity of explaining in very clear terms the difference between reference to a foreign system of law and incorporation into a contract of a provision or provisions belonging to a foreign system. The parties to any contract, domestic or international, may use a foreign enactment as one of the terms of their contract. Instead of setting out in full the terms of a foreign code they may mention the provisions of that code and in that case it is just as if they had verbally copied the provisions in their agreement. This does not mean that the foreign law, some of the provisions of which are thus incorporated into the contract, is made the proper law of the contract. In the present case the parties had not submitted to Canadian law. They had only incorporated one Canadian statute, the Water Carriage Act, instead of setting out the provisions of that Act in full. The difference between this "shorthand" way of expressing contractual terms and submission to a foreign law is clearly seen, when, as in the present case, the law changes between the time of the making of the contract and the moment when the case comes before the Court. When the present case came before the Courts of Nova Scotia the Canadian Water Carriage Act had been repealed. This would have been of importance if the parties had submitted to Canadian law as a whole, but in a case of incorporation, where the foreign enactment is nothing but a term of the contract, its repeal cannot affect its contractual operation. The rule that the parties may incorporate foreign provisions in their contract was treated by Lord Wright as a rule of English Private International Law. It may, however, be argued that it is in fact a rule of English municipal law which permits this shorthand expression of contractual terms. That the difference between reference and incorporation is of very great commercial importance indeed is mentioned by Lord Wright himself when he points out that the incorporation of terms of a given system of law in a commercial contract must not lead to the grave danger that bankers and other business men dealing with the bill of lading are faced with the necessity of investigating that foreign law as a whole.

III

In connexion with this question Lord Wright gave an explanation of the decision in *Ralli Brothers* v. *Compañia Naviera Sota y Aznar*, [1920]

2 K.B. 287. In Dicey's view this decision embodies a principle that the legality of the performance of a contract is governed by the *lex loci solutionis* whatever be the proper law of the contract. In an article published in the *British Yearbook of International Law*, 1937, page 97, Dr. Mann points out that this rule belongs to English municipal law and that it is only an extension of the well-known principle that subsequent illegality excuses performance according to the English law of contracts. Lord Wright treats the principle in the *Ralli* case as an example of incorporation of a foreign rule by the proper law. It seems, therefore, that Dr. Mann was right when he pointed out that the *Ralli* rule could only operate if the proper law of the contract was English. Lord Wright also observes that the incidents and mode of performance are regulated by the *lex loci solutionis* only in so far as that law is incorporated by the proper law, a line of reasoning which may be of great importance in connexion with currency cases.

IV

It was thus clear that English law governed the contract. But the question arose whether the law of Newfoundland nullified the contract on the ground that it did not expressly refer to the Hague Rules, and, if so, whether an illegality imposed by the *lex loci contractus* was capable of affecting the validity of a contract subject to a proper law other than the *lex loci contractus*. In the United States the school of legal thought represented by Professor Beale and the Re-statement asserts that the formation of the contract is subject to the *lex loci contractus*, while its performance is said to be governed by the *lex loci solutionis*. This rule has never been adopted in this country where the proper law theory excludes scholastic refinements of this kind. Dicey, however, suggests in a tentative way that, whatever be the proper law of the contract, an illegality imposed by the place of its making vitiates the agreement in the eyes of English law. This principle is attacked by Dr. Cheshire and it must now be regarded as exploded by the case under review. The decision was that even if Newfoundland law nullified this English contract it would have to be upheld in the Courts of Nova Scotia. The validity of a contract is governed by its proper law and not by the *lex loci contractus*. It may be, of course, that the Courts of the country in which the contract was made regard its illegality as a matter of *ordre public international*. For example, if the English contract had come before the Courts of Newfoundland, those Courts might have refused to enforce it, treating the illegality as a matter of international public policy. The Courts of a third country, however, are not concerned with the *order public* of the *lex loci contractus*, and the case is an important authority for the principle that the Courts of this country will not be concerned with the international public policy of any other.

In order to dispose of Dicey's suggested rule the Judicial Committee had to discuss two cases which are frequently quoted for its support. The well-known decision of the Court of Appeal in *Re Missouri S.S. Company* (1889), 42 Ch.D. 321, contains dicta by Lord Halsbury which seem to justify an encroachment of the *lex loci contractus* upon the scope of the proper law with regard to illegality. Lord Wright, however, was of the opinion that this well-known dictum referred to "matters of foreign law of such a character that it would be against the comity of nations for an English Court to give effect to the transaction." In other words, he treated

Lord Halsbury's dictum as an expression of the principle of municipal law that a contract is void if it is calculated to interfere with the friendly relations between His Majesty's Government and a foreign State. Of this purely municipal English doctrine *Foster* v. *Driscoll*, [1929] 1 K.B. 470, is perhaps the most outstanding example. Again, views expressed by Dr. Mann in his article seem to have foreshadowed the development of the law.

The other case which had to be disposed of was *The Torni*, [1932] P. 78. In that case the Court of Appeal applied the law of Palestine to a bill of lading made in Palestine and by its own terms to be "construed" according to English law. This case was regarded by some as an authority for the correctness of Dicey's statement. But it had also been suggested that the bill of lading in *The Torni* was not subjected to English law at all, the English rules of *construction* only being incorporated in the contract. This highly artificial distinction between "to be governed" and "to be construed" by English law was not acceptable to Lord Wright. He was of the opinion that English law was the proper law of the contract in *The Torni* and that the decision of the Court of Appeal was wrong. The Privy Council expressly refused to follow it. English law should have been applied by the Court of Appeal; Palestinian law, the *lex loci contractus*, had nothing to do with the case.

Thus, the proper law theory of English law has at last come into its own. Once the parties have selected, expressly or impliedly, the law applicable to their case, it does not matter where the contract was made and where it is to be performed. The "autonomy" principle of English law is now co-extensive with that of the French and other Continental systems. In so far as the international theory of contracts is concerned the gulf between American and English law is now wider than that between English and Continental law.

This extends even to the formation of the contract itself. It has never been decided in this country which law determines the effect of an offer and of an acceptance of a contract. Lord Wright is of the opinion that this is also a matter to be decided by the proper law and not by the law of the country where the contract happened to be made. "There may also be questions in some cases as to the effect of non-performance of conditions, which, by the foreign law of the place where a contract was entered into, are essential to its formation, though even in that case the validity of the contract may depend on its proper law."

V

The plaintiffs contended that in view of the alleged invalidity of the bills of lading the defendants had become "bare bailees" and common carriers and could be made liable in tort. The question did not arise before the Privy Council, because their Lordships held the bills of lading to be valid. It was, however, pointed out that, even if they had been void, the plaintiffs could not have succeeded, because they were *in pari delicto* and could not, therefore, rely on the invalidity of the bills. Moreover, no liability in tort was possible beyond the contractual liability as determined by the bills. These were only *obiter dicta*. Had the Judicial Committee used this line of reasoning as the basis of their decision, as had been done by the Supreme Court of Nova Scotia, they would have had to examine the question which law governed the defendants' alleged liability in tort. This question could hardly be affected by English law.

It was purely a matter for Nova Scotia law being the *lex fori* as well as the *lex loci delicti commissi*.

VI

Apart from its importance for the conflict of laws, the decision must also be regarded as an authority in Mercantile Law. The Newfoundland Carriage of Goods by Sea Act is identical with the English Act of 1924, and the interpretation given to the former can be applied to the latter. The Judicial Committee found that s. 3, the so-called paramount section, need not be complied with in order to make the Act applicable. The Hague Rules apply although they are not expressly mentioned. Even if they are not mentioned the validity of the bill of lading is not affected. This is a statutory provision the infringement of which does not nullify the contract. It was clearly demonstrated by Lord Wright that this is the only construction which is in accordance with commercial convenience and that it would be against the interests of all those concerned with bills of lading if a mere omission to mention the Hague Rules invalidated the instrument.

The formidable difficulties which have to be overcome by international "legislation" are clearly demonstrated by this case. The scope given to the choice of law by the parties would seem to make it possible that by selecting a foreign system the operation of the Hague Rules can be excluded. It was suggested by Lord Wright that reference to English law as the proper law includes a reference to English conflict rules which incidentally would seem to import the recognition of *renvoi* in the field of contracts. One may wonder whether this is a desirable theory. If the parties submit to English law they want their agreement to be governed by the rules of English municipal law and not to be referred to a third system. Moreover, if a reference to English law was interpreted as a reference to municipal law only, the possibility of evading the Hague Rules could be restricted. S. 1 of the English Act of 1924 can be regarded as a rule of Private International Law limiting the application of the Hague Rules to shipments from English ports. If a reference to English law was interpreted as a reference to municipal law only, s. 1 would not be included in the reference and the Hague Rules would be applicable as part of English law, being the proper law of the contract.

O. Kahn-Freund.

Stare decisis: Indecision in the Court of Appeal

Nearly all writers on the English legal system state categorically that the Court of Appeal is bound to follow its own previous decisions. The matter is, however, rather more doubtful than this large measure of agreement would suggest.

Salmond (*Jurisprudence*, Ninth Ed., p. 234) sets the pace by declaring that the Court of Appeal is absolutely bound by its own decisions and by those of older courts of co-ordinate authority, as, for example, the Court of Exchequer Chamber. In this he is followed by Geldart (*Elements of English Law*, p. 16—which in its later editions has the additional authority of Sir William Holdsworth), Mr. Fifoot (*English Law and its Background*, p. 24), Dr. C. K. Allen (*Law in the Making*, p. 154), Dr. Keeton (*Elementary Principles of Jurisprudence*, p. 70), and Dr. Goldschmidt (*English Law from the Foreign Standpoint*, p. 34). The same view is inherent in the

definition of the doctrine of precedent by Professor Jenks (*The Book of English Law*, p. 34). Professor Goodhart is more cautious, however, in his article "Precedent in English and Continental Law," 50 L.Q.R., p. 40, *et seq.* Although he states that the Court is probably bound by its own decisions, he admits a doubt raised in his mind by *dicta* in *Newsholme Bros.* v. *Road Transport and General Insurance Co.* (*infra*). A similar caution is apparent in Messrs. Radcliffe and Cross's *English Legal System* (p. 354). Pollock (*A First Book of Jurisprudence*, p. 332) follows the main trend of opinion though he thinks that a different rule may have prevailed in the late nineteenth century. Of greater interest is an extra-judicial opinion of Sir Henry Slesser, himself a Lord Justice of Appeal. He says (*The Law*, p. 63) that the Court of Appeal will ordinarily feel itself bound to follow its own judgments on the ground of the principle of judicial comity that, normally, courts of co-ordinate jurisdiction follow one another. It would seem, therefore, that he puts the rule no higher than that which prevails as between courts of instance jurisdiction, implying thereby that the Court of Appeal might refuse to follow its own previous decisions, in which case the two decisions would stand together as competing rules, until the House of Lords had chosen between them. That, however, is not a necessary corollary from Sir Henry Slesser's statement; for it may be that, should the Court be moved to infringe the principle of judicial comity, the later decision would overrule and abrogate the earlier.

Judicial statements are by no means unanimous but there are positive pronouncements which make it difficult to accept the more dogmatic statements of the textbooks.

In *Mills* v. *Jennings*, 13 Ch.D. 639, 648, Cotton, L.J., delivering the opinion of the Court (James, Bagallay, and Cotton, L.JJ.) said: "As a rule this Court ought to treat the decision of the Court of Appeal in Chancery as binding authorities; but we are at liberty not to do so when there is a sufficient reason for overruling them." The Court of Appeal in that case refused to follow a decision of the Court of Appeal in Chancery and affirmed its liberty "to reconsider and review the decision in that case as if it were being reheard in the old Court of Appeal in Chancery as was not uncommon." In *Kelly* v. *Kellond*, 20 Q.B.D. 569, Lord Esher, M.R., introduced some confusion by drawing a distinction between a full Court of six members and the ordinary quorum of three. In his view if the accuracy of a decision of the lesser number is called in question in a full Court that Court is entitled to decide whether or not to follow it. The learned Master of the Rolls, therefore, upheld the contention that the decision of a "quorum court" in *Roberts* v. *Roberts*, 13 Q.B.D. 295, had been overruled by a full court in *Ex parte Stanford*, 17 Q.B.D. 259, 269. Lopes, L.J., was also satisfied that though *Roberts* v. *Roberts* was directly in point it had been overruled by the later decision (at p. 575).

In *Wynne-Finch* v. *Chaytor*, [1903] 2 Ch. 475, the Court sat with six Lords Justices and was faced with an earlier decision in *Daglish* v. *Barton*, [1900] 1 Q.B. 284, which was inconsistent with the view the Court took of the case before it. Their Lordships, being unable to agree with that case and thinking that it ought not to be followed, declared: "It is, therefore, overruled."

In *Newsholme Bros.* v. *Road Transport and General Insurance Co.*, [1929] 2 K.B. 356, Greer, L.J., said, without specifying the occasions, that the Court of Appeal had at least on two occasions sitting as a full Court differed from previous decisions of the Court, "and it seems to me,"

he added, "that, if that is right, it is equally right to say that, sitting with a quorum of three judges, it has exactly the same power as if it were sitting with six judges, though it would only be in most exceptional cases that those powers would be exercised" (at pp. 384–5).

Finally, in *Shoesmith* v. *Lancashire Mental Hospitals Board*, [1938] 4 All E.R. 186, Greer, L.J., reiterated his view in identical terms (at pp. 189–90) and summed the matter up thus: "Although as a matter of courtesy and of usual practice this Court deems it right to follow its own decisions in earlier cases there is no rule of law which compels it to do so." In this opinion Slesser, L.J., concurred, though he expressed agreement with the dictum of Lord Ellenborough, L.C.J., in *Moorson* v. *Kymer*, 2 M. & S., 303, 313, that "it is extremely dangerous to shake the authority of decided cases."

There are, however, impressive dicta on the other side. Thus in *Pledge* v. *Carr*, [1895] 1 Ch. 51, Lord Herschell, L.C., said: "We cannot overrule *Vint* v. *Paget*, for that was a decision of a court co-ordinate in jurisdiction with ourselves; all we can do, therefore, is to dismiss this appeal." Lindley and A. L. Smith, L.JJ., concurred. Again, in *Lavy* v. *London County Council*, [1895] 2 Q.B. 577, 581, Lindley, L.J., said: "The case of *L.C.C.* v. *Cross* is a decision which I think is not only correct, but it is a decision of the Court of Appeal which we should be bound to follow whether we thought it right or not." So great an authority as Scrutton, L.J., in the *Newsholme Case* (*supra*) gave it as his view that where the Court of Appeal decides that from certain facts certain legal consequences flow the decision is binding on the Court of Appeal in any case raising substantially similar facts (at p. 375). More recently, in *Sigley* v. *Hale* [1938] 3 All E.R. 87, 89, Greer, L.J., found it difficult to appreciate the reasons for a decision of the Court of Appeal which had been cited in argument but, nevertheless, admitted that "if a similar case ever comes before this Court on similar facts we will feel ourselves bound, owing to the traditional way in which these matters are treated, to follow that decision." In *Windsor* v. *Chalcraft*, [1938] 2 All E.R. 751, Slesser, L.J., admitted that a previous decision of the Court "of course, is binding upon us" (p. 756). And again, in *Cohen* v. *Cohen*, [1939] 2 All E.R. 596, McKinnon, L.J., in a judgment in which Luxmoore, L.J., and Macnaghten, J., concurred, referred to a previous decision of the Court and said that if that decision were wrong the Court of Appeal was powerless to overrule it and that only the House of Lords could do so.

It would be presumptuous, in the face of the diverse opinions of distinguished lawyers, to express any dogmatic conclusion. It is submitted, however, that Lord Esher's red herring can be advantageously ignored. There is no ground in law for imputing superior powers to a full Court. No doubt the decision of a full Court would in practice weigh very heavily, but the composition of the Court cannot affect the formal validity or legal weight of the decision. In practice, too, difficulties might arise. Thus, would a decision of six Lords-Justices be liable to be overruled by a decision of a full bench of the recently augmented Court of Appeal? The whole matter is one on which an authoritative pronouncement is necessary. This is, perhaps, an opportunity for the common law to admit a greater degree of flexibility into the working of judicial precedent. The rival interest of certainty would not necessarily suffer since the Court of Appeal would be unlikely to exercise its overruling powers except "in plain cases where serious inconvenience or injustice would follow from

perpetuating an erroneous construction or ruling of law," in the words used by Lord Wright as a guide to the House of Lords (*Admiralty Commissioners* v. *S.S Valverda*, [1938] A.C. 173).

E. Wyndham White.

Common Employment in the House of Lords.

The decision of the Court of Appeal in *Radcliffe* v. *Ribble*, [1938] 2 K.B. 345, (annotated in Vol. II, No. 1, p. 43) has been reversed by the House of Lords, mainly by taking a different view of the facts. In the Court of Appeal stress was laid on circumstances which might serve to distinguish the case from the decision in *The Petrel*, [1893] P. 320, such as the similarity of the orders given to the coachdrivers and the fact that they were working in close juxtaposition. Greer, L.J., spoke of the existence of a team, but Lord Macmillan took the view that the drivers' work "involves their dispersal, not their collaboration." The House of Lords also disagreed with the Court of Appeal's finding that the negligent driver in attempting to assist the deceased had acted in a manner expected of him by his employer. The case was thus brought clearly within the *ratio* of *The Petrel*, and this decision was approved without hesitation, whereas the Court of Appeal had refused to express an opinion on it.

Beyond this confirmation of *The Petrel* the decision also indicates that wide scope is to be given to the limitation on the doctrine of common employment which is expressed in *The Petrel*. This seems to be the conclusion to be drawn from expressions of condemnation of common employment coupled with the statement that it is subject to important qualifications. This is another instance of the interpretation of a rule of law in a spirit directly opposite to that which inspired its initiation. Adjustment of the law to major changes of social policy is a matter for the legislature. If left to the courts it cannot be performed completely, and it is likely to produce some tortious reasoning which must detract from the authority and scientific character of the legal system.

The House of Lords, in addition to explaining its strict interpretation of "common work" on grounds of social policy, attempted to justify it according to more traditional methods of legal reasoning. It sought to trace the limits of common employment by examining the logical basis of the doctrine. It is of interest that when examining the various theories as to the true basis of the doctrine, Lord Atkin rejected that theory which is suggested by the most recent defender of the doctrine. Mr. Stephen Chapman argues that in the case of a servant "the whole foundation of the rule of vicarious liability has disappeared, because there is no question of any third party." (Vol. II, No. 4, at p. 294.) This argument, "namely that the doctrine of *respondeat superior* only applies to strangers, that it has no application to the servants of the employer," is described by Lord Atkin as "a fallacious proposition from first to last." (55 T.L.R., at p. 462.) The House of Lords accepts the theory of an implied contract as the basis of common employment, although this theory has been riddled by objections summed up most convincingly by Mr. Chapman. The difficulty of answering the question whose negligence the plaintiff would have excepted from his fictitious consent to risk negligence of his fellow-employees is, however, appreciated by the Court. Thus Lord Wright admits, "it is difficult sometimes to fit a factual qualification on a fictitious contract." Similarly Lord Atkin: "I strongly suspect that one cause of the difficulty

(of defining "common work") has been the unsatisfactory statement of any principle on which the rule is founded." He also states "that the Courts have in many cases tried to determine the limits of the principle as an objective rule of law without having regard to its foundation in the implied contract of the workman." This failure to consider the implied contract-theory might be explained by the fact that it would have been of little assistance in determining the limits of the doctrine, and the description of the treatment of common employment as of "an objective rule of law" appears to be a euphemism for: a doctrine lacking a sound logical or social foundation and therefore incapable of rational interpretation. Although the House of Lords could not remedy these defects its judgment is of value as prescribing the proper judicial bias in the approach to problems of common employment.

Following this decision, *Metcalfe* v. *L.P.T.B.* has also been reversed in the Court of Appeal, [1939] 2 All. E.R. 542. But this result was reached simply by attaching the fate of this case to *Radcliffe's Case*, although, it is submitted, the fallacy of the judgment of the Court of first instance lay in preferring the analogy of the facts of *Radcliffe's Case*, as found in the Court of Appeal, to the facts of *The Petrel*. The judgment of Macnaghten, J., may have been influenced by the loss of authority which *The Petrel* suffered as a result of the Court of Appeal's decision in *Radcliffe* v. *Ribble*. But this consideration cannot prevail after the approval of *The Petrel* in the House of Lords. An interesting result of the confirmation of the implied contract-theory by the House of Lords is counsel's argument as to the impossibility of implying into Metcalfe's contract of employment a term providing for acceptance of the risk of injury actually suffered. In cases where actually no contract of employment had been concluded this type of argument had prevailed over the plea of common employment. Lord Wright mentions these cases with approval and points out that later cases where common employment was held to apply to volunteers can only be sustained if they can be reconciled with the implied contract-theory. A revival of this reasoning would introduce into the law of master and servant artificialities similar to those which have encumbered the law of unjust enrichment.

J. Unger.

Statute of Frauds and Quantum Meruit

Quantum meruit has frequently been in the legal news during recent years, and the basis on which it rests has been changed. Originally the doctrine of implied term was its mainspring, but this led to inequitable results, and the doctrine is now in the process of being discarded, at least as far as *quantum meruit* is concerned. As Greer, L.J., remarked in *Craven Ellis* v. *Canons, Ltd.*, [1936] 2 K.B. 403, in opposition to Goddard, J.'s decision at the trial, "the inference is not one of fact, but is an inference which a rule of law imposes on the parties where work has been done or goods have been delivered under what purports to be a binding contract, but is not so in fact." Indeed, the familiar argument that there could not be an implied term where there was an express consent bordered on the absurd, where the express consent related to a contract which the law did not consider binding.

The recent judgment in *Adams* v. *Union Cinemas, Ltd.*, [1939] 1 All E.R. 169 was used by Stable, J., as an opportunity to reaffirm the principle

laid down in the *Craven Ellis Case, supra,* though, it is submitted, the legal question involved hardly warranted this departure.

What happened was this. The plaintiff was employed by a cinema company, and when the latter was reconstructed in 1936 he became the defendants' servant, and continued to perform his old duties. The defendants were satisfied with his work and decided to promote him. This was done in a very casual way. On 25th June, 1937, the plaintiff was asked to step into the room of one of the directors, and was offered the position of controller of 120 cinemas at the same salary which was drawn by his predecessor. The director was not sure how much it was, but rather thought it ran into £2000 per annum; this figure later turned out to be correct. Some talk ensued about the post in general, and in the course of it the plaintiff asked for how long he was going to be appointed. He was told in reply that he should make arrangements for two years, but, the director added, "you will see how you get on with the work." With this the interview ended, and on 28th June the plaintiff entered on his new duties. He asked for a formal contract, which was promised but deferred, and he only received his old salary with a promise of adjustment later on. Subsequently the defendant company passed into other hands, and the defendant was given one month's notice. He sued for payment of the balance due to him while he had worked as well as for wages in lieu of a longer notice than one month.

The defendants denied liability. They relied first on s. 4, Statute of Frauds, and on *Britain* v. *Rossiter* (1882), 11 Q.B.D. 123, and secondly on the recent case of *Vernon* v. *Findlay* (1938), 55 T.L.R. 77.

However, judgment was given for the plaintiff. He was entitled to the arrears of his salary and to six months' notice. The learned judge came to the conclusion that the negotiations of 25th June did not amount to a contract. The two years mentioned as the duration of the service was (p. 172) "the perfectly natural forecast that Mr. Bernard (the director) was making as to how long, at all events, this relationship would continue, provided that everything went well." The defendants' offer was accepted by the plaintiff taking up his duties on 28th June, and the two years were then not agreed upon. What had happened was merely a modification of the plaintiff's former duties, and such an arrangement did not fall within s. 4, Statute of Frauds. The learned judge also considered *Vernon* v. *Findlay* to have been wrongly decided. There a verbal contract of service was made in December, the work to begin on 1st January, and to go on for one year. On these facts the contract was held not to be binding and the plaintiff not even entitled to a *quantum meruit,* but Stable, J., in *Adams's Case* thought that this decision was contrary to *Craven Ellis* v. *Canons, Ltd.* As to this, see *Modern Law Review,* Vol. 1, p. 76.

It is respectfully submitted that, though the result is right, two matters were dealt with in the judgment which were altogether incompatible, thus casting doubt on the entire reasoning.

In the first place, it seems curious that the reason for the contract being outside the statute should have been that what was done was only a modification of an old contract, when the learned judge himself said in an earlier passage (p. 171): "The question as to when the variation of the terms of a contract constitute a fresh contract and cases in which it is a mere modification of an existing contract are really cases which involve the splitting of hairs, and are mere questions of words."

It is suggested with deference that the real reason why the contract

fell outside the statute was based on the finding of fact that no fixed period had been agreed upon. "If the contract is for an indefinite time but can be determined by either party with reasonable notice within the year the statute does not apply." See Anson's *Law of Contract*, 18th edition, p. 68, and *McGregor* v. *McGregor* (1888), 21 Q.B.D. 424. However this proposition was not touched upon in the judgment.

Since therefore there was a valid contract for an indefinite time the question of a *quantum meruit* could not arise, and the words devoted to this problem become unnecessary, though they are of some importance because they point out that *Vernon* v. *Findlay* was in conflict with the decision of the Court of Appeal in the *Craven Ellis Case*.

Adams v. *Union Cinemas, Ltd.* is of interest only for two reasons. It supplies at last a commercial example of contracts for an indefinite period, and will illustrate to the student better than *McGregor* v. *McGregor* a proposition of law which is important while we suffer under the Statute of Frauds. Moreover, since there is a certain scarcity on this point, the practitioner will be glad to have a case which tells him what is a reasonable period of notice for a superior official in a business enterprise.

O. C. Giles.

Mortgages: Postponement of the Contractual Right to Redeem

It has been said[1] that in order to understand the equitable rules relating to mortgages "we must project ourselves into the thought of the seventeenth rather than into that of the twentieth century. The mortgagor must at all costs be protected—such was the fanatical creed of equity at the earlier period." Lord Northington, L.C., epitomised this traditional approach of equity in *Vernon* v. *Bethell*, 2 Eden 710: "Necessitous men are not, truly speaking, free men but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." This bias in favour of the mortgagor, springing from an antipathy to usurious extortion from the needy borrower, is, however, out of place when the Court is considering a transaction between parties who are competent business men, acting on skilled advice, and well able to judge of their own interests. Recent cases dealing with collateral stipulations in mortgages show a growing recognition of these realities. The transition from *Bradley* v. *Carritt*, [1903] A.C. 253, to *Kreglinger* v. *New Patagonia Meat Co.*, [1914] A.C. 25, marks a significant stage in the development of the law. The case of *Knightsbridge Trust Co.* v. *Byrne* (1939), 55 T.L.R. 196, is an equally significant decision. The plaintiffs, a private limited company, borrowed a sum of £310,000 from an insurance company and as security mortgaged to the lenders property consisting of a number of houses, shops and flats. It was agreed that the principal sum, together with interest at 5¼ per cent, should be repaid by eighty half-yearly payments spread over a period of forty years, this method of repayment being suggested by the mortgagors. The mortgagee's remedies became immediately exerciseable if the mortgagors should sell the equity of redemption without the consent of the mortgagee. There was no power under which the mortgagors could sell any one of the properties mortgaged free from the mortgage. The mortgagors were also restrained from granting leases for more than three years without the consent of the mortgagee. The mortgagors claimed that they were entitled to redeem on giving the usual six months' notice and paying

[1] H. G. Hanbury, *Modern Equity*, 2nd ed., p. 393.

the principal interest and costs. This they were clearly not entitled to do under the terms of the agreement, but they contended that the right to redeem cannot be postponed for an unreasonable period and that forty years was unreasonable. There is ample support for this proposition in the textbooks. Thus the statement in *Coote on Mortgages*, 9th ed., Vol. 1, page 15, is typical: "The mortgagor may stipulate that he will not pay off his debt and so redeem his mortgage for a fixed period, as, for instance, five or seven years. . . . But it is otherwise where the period is unreasonable. . . . A proviso restraining redemption for so long a period as twenty-eight years is always unreasonable and void, at least where there is no corresponding restriction preventing the mortgagee from calling in his money." This and similar statements are founded on a line of cases starting with *Teevan* v. *Smith*, 20 Ch.D. 724, and culminating in *Davis* v. *Symons*, [1934] Ch. 442. In the former case Jessel, M.R., said that a mortgagor may be precluded from redeeming for a fixed period such as five or seven years. Later cases (e.g. *Morgan* v. *Jefferies*, [1910] 1 Ch. 627) suggest that the proviso must be mutual, i.e. the mortgagee must be restrained from calling in the loan for a like period, and in any case the Court may prevent the application of the clause "if it is too large, or there are circumstances connected with the proviso which render it in the opinion of the Court unreasonable or oppressive" (*per* Romer, J., in *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307, 311; *cf. Bradley* v. *Carritt*, [1903] A.C. 253, 259, *per* Lord Macnaghten). In *Morgan* v. *Jeffreys*, [1910] 1 Ch. 620, Joyce, J., gave relief against a proviso postponing redemption for a period of 28 years as being unreasonable, having regard to the position of the mortgagor, the character of the stipulations in the agreement and the severity of the provisions for the benefit of the mortgagee. In *Davis* v. *Symons*, [1934] Ch. 442, there were mutual covenants between mortgagor and mortgagee that the principal sum should be allowed to remain on the security of the mortgage for twenty years. While not prepared to say that the period of twenty years was necessarily unreasonable, Eve, J., gave relief against the proviso because there were other stipulations in the mortgage deed hampering the mortgagor which rendered this provision unreasonable.

The case came in the first instance before Luxmoore, J. ([1938] Ch. 741). The learned judge, basing himself on these decisions, proceeded to consider the proviso in the light of the other provisions in the deed. In the result he decided that the provision for postponement was unreasonable having regard particularly to the fact that the mortgagors had no power to sell any part of the mortgaged properties free from the mortgage even though the value of the property might be many times in excess of the amount outstanding, and that the mortgagee's powers became exerciseable on any default by the mortgagor in the covenants to repair or insure any part of the mortgaged properties again even though there was a wide disproportion between the property charged and the amount for the time being outstanding.

On appeal the Court of Appeal emphatically rejected the suggestion that the Court has power to relieve against a proviso for postponement of the contractual right to redeem on the ground that it is unreasonable. Such a proviso is not a clog on the equity of redemption since it is concerned with the contractual right to redeem. It is indisputable that any provision which hampers redemption after the contractual date has passed will not be permitted. In so far as the earlier cases suggest that the Court

can give relief on the ground that the proviso is unreasonable they cannot be supported. Equity does not reform mortgage transactions because they are unreasonable. It is concerned to see two things: (1) that the essential requirements of a mortgage transaction are observed (2) that oppressive or unconscionable terms are not enforced. A postponement of the right of redemption may be the badge of oppression, or it may be unreasonable in the sense that it renders the right of redemption illusory. So that where in a mortgage of a lease of twenty years the contractual right to redeem is postponed until six weeks before the expiration of the lease equity will grant relief since the right of redemption, which is an essential element of a mortgage, is thereby rendered illusory (*Fairclough* v. *Swan Brewery Co. Ltd.*, [1912] A.C. 565). There was nothing in the present transaction to render the right of redemption illusory and the postponement being in itself unobjectionable it could not be made objectionable by the presence in the mortgage deed of other provisions unless the totality were sufficient to enable the Court to say that the contract was so unconscionable or oppressive that it ought not to be enforced in a court of equity.

Quite apart from the technicalities of the law of mortgages the judgment of Greene, M.R., is a striking assertion of the claims of freedom of contract. The learned Master of the Rolls vigorously repudiated the suggestion that when considering the "reasonableness" of the transaction the Court is confined to the terms of the disputed document and may not take account of extraneous circumstances. The Court cannot tell business men that an agreement is unreasonable unless it considers the "business realities." "To hold that the law is to tell business men what is reasonable in such circumstances and to refuse to take into account the business considerations involved would bring the law into disrepute" (at p. 198). In the result, even had the Court been inclined to adopt the standard of "reasonableness," it would have come to a different conclusion from Luxmoore, J. Here the Court was faced with "a commercial agreement between two corporations experienced in such matters and [which] has none of the features of an oppressive bargain where the borrower is at the mercy of an oppressive moneylender" (at p. 198). When all the circumstances were considered it was a proper business transaction with which the Court would not interfere.

It had also been contended before Luxmoore, J., that the postponement of the contractual right to redeem for a period of forty years offended the rule against perpetuities and was therefore invalid. Luxmoore, J., referred to *Gray on Perpetuities*, 3rd ed., pp. 460–3, where a similar suggestion is made, but was satisfied that the perpetuity rule could have no application to a mortgage by demise since it has been universally accepted that the perpetuity rule has no application to a condition in defeasance of a term of years (*cf.*, 3rd Report, Real Property Commissioners, 1832, p. 43; Challis, *Real Property*, 3rd ed., p. 186). Quite apart from that argument the learned judge was satisfied that the rule against perpetuities has no application to mortgages and to apply it to mortgages would be inconsistent with the history and principles of redemption of a mortgage. On this point the Court of Appeal upheld Luxmoore, J. Mortgages are not within the particular mischief that the perpetuity rule was designed to prevent, namely the tying up of land for unduly long periods by testators and settlors. The Rule has never been applied to mortgages and it would be wrong now so to apply it.

It was also argued before the trial judge that the mortgage deed was a debenture within the meaning of the Companies Act, 1929, s. 380; consequently s. 74 of the Act applied to it and the provisions of that section had the effect of excluding the rules of equity relating to postponement of redemption. The learned judge held that s. 74 has no application to an ordinary mortgage. On this point the Court of Appeal expressed no opinion.

E. Wyndham White.

REVIEWS

CARDOZO AND FRONTIERS OF LEGAL THINKING. By Beryl Harold Levy. New York: Oxford University Press. **$2.50.** London: Humphrey Milford, 1938. xv + 315 pp. **10s. 6d.**

Since the passing of Mr. Justice Holmes, the brightest judicial luminary of the American legal scene has been his successor on the Supreme Court of the United States, Benjamin N. Cardozo, previously Chief Judge of the powerful Court of Appeals of the State of New York. Cardozo's death last year at the comparatively early age of sixty-eight, after only six years of service on the Supreme Court, is an inestimable loss not only to the American bench but to legal scholarship. For Cardozo was no ordinary appellate judge. Not only was he a common law judge in the tradition of Mansfield and an equity judge in the tradition of Hardwicke; not only was he a worthy successor to Holmes in the delicate task of constitutional adjudication which forms the main preoccupation of the highest court of the United States; he also has told us more than any other of the actual method and technique of judicial decision and has written with rare grace and profound insight of the permanent problems of law and jurisprudence. Between 1922 and 1928, while a member of the highest court of New York, there appeared from his pen three small volumes—*The Nature of the Judicial Process*, *The Growth of the Law*, and *The Paradoxes of Legal Science*—which rank with the classics of juristic thinking. More than any judge of the last generation, he influenced and remade American private law; in his brief service on the Supreme Court, he helped mightily to give a new direction to constitutional decision; he contributed significantly to understanding of the judicial process under the Anglo-American tradition; by the gentle force of his character he made himself loved and respected as few judges have ever been.

Much has been written about Mr. Justice Cardozo before and since his death. While Dr. Levy's volume falls in the former category, it appeared after the public career of its subject had ended, and so is not forced into the dubious incompleteness of most studies of living great men. In the book, Dr. Levy has attempted two things: First, to present a picture of Cardozo and his mode of thought and decision in relation to present currents of American juristic thinking; and second, to place before the reader a selected group of representative opinions by Cardozo himself. These attempts require separate appraisal.

Dr. Levy's own treatment makes up a little more than a third of the whole book. In length and form it is an essay. In substance, it is an anthology of quotations, mostly from Cardozo, connected by brief comments by Dr. Levy himself, with an occasional excursus into contemporary American jurisprudence or philosophy. I must admit to some puzzlement as to the character of the beneficiaries of these discussions. Is the book for lawyers, for students of jurisprudence, for educated laymen, or for whom? To take but one example, Dr. Levy discusses at some length (pp. 39–46), under the provocative heading "A Dying Myth," the old question whether judges make or only declare the law. If this discussion is for lawyers, it is for those who still live in the last century. If it is for students of jurisprudence, it assumes in them an amazing naiveté and ignorance of the literature of their subject. If it is another attempt of the many current attempts at adult education of the "intelligent layman,"

it is likely to convey a false sense of the character of the problem and how it has been dealt with in legal thought. The fact is, I suspect, that Dr. Levy has not thought his problems through, nor has he definitely decided what kind of a book he wanted to write. He has read widely. He shows some flashes of insight, as where he points out that the "method of sociology" described in Cardozo's *Nature of the Judicial Process* is rather a method of ethics (p. 61). Beside Cardozo and Holmes, he knows of the current American writers on jurisprudence and philosophy; but his method is anthological and his purpose uncertain. The main value of the first part of the book lies in those parts which Mr. Justice Cardozo has written.

The latter two-thirds of the book is all Cardozo. Dr. Levy has reprinted twenty-two selected opinions in cases decided from 1914 to 1937. All but one of these were written by Cardozo while on the Court of Appeals of New York. The one Supreme Court opinion is that upholding as constitutional the old-age benefit provisions of the Social Security Act of 1935. Of course no selection of the opinions of any judge is likely to prove wholly satisfactory to anyone other than the person making the selection, and it does not do to be too captious. But it does seem that some better criterion of choice could have been found than that of including one opinion by Cardozo "in each major field of law listed by the New York Board of Bar Examiners" (p. 122), especially when some of the selected cases do not in fact fall within the fields which they are said to represent. If the selection is to be by subject, *Palsgraf* v. *Long Island R. R. Co.*, 248 N.Y. 339 (1928) (p. 124), may well represent Torts, but not to the exclusion of *McPherson* v. *Buick Motor Co.*, 217 N.Y. 382 (1916), a decision that has had its influence across the Atlantic. See *Donoghue* v. *Stevenson*, [1932] A.C. 562. The choice of *Globe Woollen Co.* v. *Utica Gas & Electric Co.*, 224 N.Y. 483 (1918) (p. 180), as representative of Cardozo's decisions in Equity is little short of absurd. There would have been illumination in the inclusion of *Epstein* v. *Gluckin*, 233 N.Y. 490 (1922), which gave a *quietus* to Lord Justice Fry's artificial doctrine of mutuality of remedy in specific performance, or of the vigorous dissenting opinion in *Graf* v. *Hope Building Corporation*, 254 N.Y. 1 (1930), where Cardozo's words bring to mind the classical days of English equity. And how could Dr. Levy include *People* ex rel. *Lehigh Valley Ry. Co.* v. *State Tax Commission*, 247 N.Y. 9 (1928) (p. 235), as a decision on Public Utilities? It involved a public utility as relator, but it is a tax case only. However, though we may quarrel with the selection of opinions, there can be no quarrel with the opinions themselves. They can be read not only as law but as literature, and it is good to have some of them thus assembled.

In January, 1939, there was published jointly by the Law Reviews of Columbia, Harvard and Yale, a memorial number to Mr. Justice Cardozo. If any reader seeks a view of Cardozo's life and work presented with understanding and significance, let him read the articles which that issue contains. Let him read especially the brief tributes by Cardozo's associate on the Supreme Court, Mr. Justice Stone, by Mr. Justice Evatt of the High Court of Australia, and, most moving of all, by that great American federal judge Learned Hand. Let him learn of Cardozo's influence on the New York Court of Appeals from his associate there, Judge Lehman, and of his influence on the American law of contract and tort from two masters in those fields, Professor Corbin of Yale and Professor Seavey of Harvard; finally, let him study Cardozo's contributions to American

public law as appraised by Cardozo's successor on the Supreme Court, Mr. Justice Frankfurter. And if he wishes to see Cardozo as scholar and jurist in the perspective of American juristic thought, let him read Professor Moses J. Aronson's careful and thought-provoking study, "Cardozo's Doctrine of Sociological Jurisprudence," in the October, 1938, issue of the *Journal of Social Philosophy*. Best of all, let him read Cardozo's own *Nature of the Judicial Process*.

If any reader think it unfair that I should measure the slight performance of Dr. Levy against such high standards as these, I say only that one who seeks to interpret genius must be prepared to be measured in terms of the majesty of his subject.

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THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY. Harvard Studies in the Conflict of Laws, Vol. III. By ALEXANDER NÉKÁM. Cambridge, Mass.: Harvard University Press, and London: Humphrey Milford, Oxford University Press, 1938. 131 pp. **8s. 6d.**

Dr. Nékám is so much of a "realist" in matters of jurisprudence that to many he will appear an anarchist. For him all legal ideas and theories are, *ultima analysi*, the products of emotions. The emotional valuations of any one man are of course conditioned by those of others with whom he comes into contact; hence in a community with a common life we find a common ethic. And, as man has a pathetic desire to appear rational to himself, he—unconsciously—clothes his emotional valuations with the semblance of reason, so that his ethic appears to him to have an objective and absolute validity. Hence the belief in Natural Law. But examination of the views held at various times as to the content of Natural Law shows that their exponents were merely objectifying their own emotional valuations, which commonly took the form of affection for the ethic and law with which they were themselves most familiar (for example, Roman law); one feels that what one is accustomed to do oneself is "natural."

And so with the concept of Personality. Although in early communities (and even to some extent in mature Roman law) the group and not the individual may have been felt as the natural unit, modern ethic and law tend to feel and so to think of the individual human being as the natural unit. From this there have followed two conclusions, neither of them logically necessary. First, that the "legal entity"—that which in law is conceived of as the subject of rights and duties—must be a human being or at least something which has some of the characteristics of a human being and can, like the human being, be called a "person." Second, that the human being must as such have certain legal rights and that the other "persons" known to the law must have the same rights or at least the minimum of these rights which is necessary to constitute "personality."

Dr. Nékám's examination of French writings on the question of Personality shows the difficulties and contradictions caused by this desire to treat the legal entity as a "person." The French law of associations and commercial societies presents us with different types of groups which have different capacities as right- and duty-bearing entities. Are they all "persons"? If so, it would appear impossible to stop at any point short of

saying that any entity with capacity to hold even a single legal right is a "person"—a conclusion which French jurists are unwilling to accept. If not, then what is the essential minimum of rights necessary to constitute "personality"? Controversy has raged around this topic for many years and there appears no prospect of an answer which will be unanimously accepted, because—in Dr. Nékám's view—the question cannot be solved by logic and the theories of the various writers are merely attempts to justify their subjective emotional evaluations. Yet it is a question of considerable practical importance for French law.

A brief study of the Anglo-American law of "corporations" shows the same multiplicity of types of legal entity. Not one of Blackstone's five essentials "necessarily and inseparably incident to every corporation" proves to be really so in practice. There are corporations not of unlimited duration, corporations which cannot hold lands, corporations which have no common seal, corporations which have no power to make by-laws. On the other hand "unincorporated" entities may have any or several of these characteristics. There are even "unincorporated" groups which can (at least through a representative officer) sue and be sued as such. Fortunately Anglo-American law has on the whole been content to work with this multiplicity of entities, recognising the specific character of each, and has been little troubled by attempts to fit them into a uniform mould labelled "personality."

The practice of Anglo-American law thus bears out Dr. Nékám's thesis, that the word "person" is meaningless unless it simply denotes any "subject of legal rights," however many or few and of whatever nature, and that in this sense it is unnecessary and might well be replaced by the less misleading term "legal entity."

The present reviewer happening to hold a view of legal personality not far removed from that of Dr. Nékám's finds it a little difficult to criticise his book. Much of it seems to him to be a labouring of obvious truths. But perhaps it will not seem so to others. And even those who are already in agreement with its main position will be grateful for a number of reflections which had not occurred to them and of instances which they had not thought of searching out for themselves. Dr. Nékám's book in no way professes to be an exhaustive treatise. He does not refer to well-known writings and doctrines which such a treatise would have had to discuss. But his presentation gains thereby in unity and clarity. What he has given us is a coherent and well-written argument, illustrated and confirmed by a sufficiency of aptly-chosen instances, and containing many stimulating and suggestive incidental reflections. He has, by the way, although his work is published in a series bearing the general title of "Studies in the Conflict of Laws," little or nothing to say directly about that topic. But the importance of his conclusions for the subject is obvious. As he remarks on his last page: "Because of a mistaken conception of personality, many a right—belonging to entities not regarded as persons—has been lost sight of in international intercourse, while on the other hand rights and obligations have been freely distributed to so-called 'foreign persons' on the strength of their name and their supposedly essential attributes." The danger of being misled by a clumsy and ambiguous terminology is particularly great in a branch of law where the practitioner is compelled to apply concepts of foreign law of which he has not, as he has of the concepts of his own system, the instinctive understanding bred of long familiarity.

A. H. CAMPBELL.

READINGS IN JURISPRUDENCE. Selected, Edited and Arranged by JEROME HALL. Indianapolis: The Bobbs-Merrill Company, 1938. **32s. 6d.**

DIE RECHTSPHILOSOPHISCHE SCHULE DER REINEN RECHTS-LEHRE. By WILLIAM EBENSTEIN. Prag., 1938. Taussig & Taussig.

JUSTICE-DROIT-ETAT. Etudes de Philosophie Juridique. By GEORGES DEL VECCHIO. Recueil Sirey. Paris, 1938. **75 frs.**

INTRODUCTION A LA THEORIE GENERALE ET A LA PHILOSOPHIE DU DROIT. By CLAUDE DU PASQUIER. Recueil Sirey. Paris, 1937.

LE BUT DU DROIT: Bien Commun, Justice, Securité. Recueil Sirey. Paris, 1938.

The publication of Professor Hall's book (of almost 1200 pages) must be hailed as a major event in the study and teaching of Jurisprudence. In no other field is a selection of readings as difficult as in Jurisprudence, a subject composed of so different parts and infinite in scope. But it is all the more important to have, instead of scattered and largely inaccessible literature or of second-hand accounts, a selection of original texts, systematically arranged and detailed enough to give an adequate idea of the author and the problem in question.

Professor Hall's book has three main parts: Philosophy of Law, Analytical Jurisprudence, Law and Social Science. The first is, in many ways, the most interesting, because there is not yet any systematic treatise on legal philosophy in the English language, despite the increased interest in continental philosophy. The teaching of legal theory is at present a difficult task in this country, owing to the lack of a systematic background. Certain continental authors have been discovered and translated, and the unfortunate student is treated to some Stammler or Kelsen, without the general and philosophical background without which they are unintelligible. Professor Hall's arrangement and selection is admirable. I would venture only two criticisms. In the chapter on Natural Law there is no reference at all to the revival of Natural Law theories in modern times. Many of the modern theories, to be sure, use the name rather than the substance of Natural Law. But that is certainly not true of jurists like Cathrein, Hauriou, Renard, Bonnard, Le Fur, etc., who in many ways give a revival of scholastic thought. The next edition, it is hoped, will include some account of modern Natural Law theories. A more serious criticism is the complete omission of any account of totalitarian theories in Jurisprudence. The present reviewer has repeatedly drawn attention to the pathetic neglect, by legal science in the democratic countries, of the profound effect which totalitarian political theories have upon the meaning and function of law. Hardly anything is of more vital importance to the present-day student of Jurisprudence. Such a chapter might have started with Hegel—who, surprisingly enough, finds no place at all in the book—and traced Neo-Hegelianism down to Fascist and National-Socialist theories on one hand and legal Materialism (Marx, Communism) on the other.

The second part wisely refrains from formal analysis of special subjects, such as Tort, Property, etc., which, as the author rightly remarks, can only be adequately studied in connexion with that particular branch.

It deals instead, in an admirable selection, with problems of logical analysis of the law.

In the third part Professor Hall clearly shows his own opinion on the scope of Jurisprudence. It is entitled "Law and Social Science," and gives a very extended and valuable selection of readings on the many points of contact between legal and social science. In view of the vagueness of the term "Sociological Jurisprudence," Professor Hall's arrangement is particularly interesting. It is also interesting that the proportion of English authors in this part is infinitesimal. One difficulty is that the selection must be confined to texts in the English languages. Despite the increasing number of translations of continental texts, there are bound to be many gaps. Some of them could have been overcome by extracts from representative accounts in English books.

The pedagogic value of the book is enhanced by a number of footnotes in which questions are put in connexion with the subject under consideration. Thus at the end of the chapter on Historical Jurisprudence, Professor Hall very appropriately puts some questions on the doubtful meaning of this term.

No classification in Jurisprudence will, of course, command universal assent. But as a basis for the study of almost any field of Jurisprudence this book will, in future, be indispensable.

Dr. Ebenstein's book is a very able presentation of the philosophical and juristic basis of the Pure Theory of Law, and of the particular results which the Vienna School—Kelsen, Merkl, Weyr, Verdross and others—have reached. The author lays particular stress upon the concrete juristic conclusions and the solution of legal problems by the theories of the Vienna School, in particular by its Stufentheorie (the theory of the concretisation of the law). The author is perhaps too seldom critical. Thus it is rightly pointed out that the theory of concretisation from the general fundamental norm down to the concretisation by judgment and enforcement tallies with the Free Law theories which show that the judge often has a choice between different solutions in applying the legal norm by which he is bound. True, but the Pure Theory of Law gives no help or guidance as to the finding of the proper solution. Maybe it is not "pure" law. But then it is not enough to know pure law. The judge must know something else, and it is just as well that jurists should try and find out something about it, rather than to be guided by sentiment. The one serious omission in this very careful book is the absence of anything more than a reference to the implications of the Pure Theory of Law in the field of Public International Law. Yet in that field it has perhaps made its most important contribution, by showing the incompatibility of national sovereignty with a true International Law.

The French translation of the most important of Del Vecchio's later essays will make accessible to a larger public his more recent teaching which shows some remarkable developments from the Neo-Kantian basis so clearly apparent in the author's "Formal Bases of Law." Much of the later work is devoted to a juristic glorification of Italian Fascism, in all its aspects, and of the corporative system in particular, as the synthesis of individual liberty and state authority. The author emphatically affirms that the Fascist state maintains the autonomy and the fundamental rights of the individual and, indeed, gives them perfect expression. (This was before the measures of racial discrimination.) In a lecture given in 1931 on State and International Society the author goes far in stipulating

the supremacy of international over national society and the progressive integration of states into a universal society. When the lecture was published in 1936 in Bucharest, the author added a rider reserving his position towards the recently adopted attitude of the League.

The present reviewer does not wish to question the sincerity of Professor Del Vecchio's political convictions nor to give a judgment on the political or juristic merits of Fascism. But the present volume seems to him to be an alarming example of the way in which legal philosophy may be distorted to justify desired political conclusions. If it is possible to deduce Fascism from Kant, everything is possible. Again if Fascism protects the autonomy of the individual—an assertion contrary to the essential and avowed principles of Fascism—autonomy of the individual may mean anything. Every legal theory builds, of course, on certain basic assumptions of an ethical or political character. And there are certain fundamental assumptions between which there is no compromise.

Needless to say the collection shows again the eminent jurist's profound learning and lucidity of exposition.

Professor du Pasquier's book is a very useful, concise course on Jurisprudence, designed for continental students. Its chief value for the English and American student of Jurisprudence lies in the introduction given to all currents and representatives of continental legal theory, down to 1937, while the complete absence of any reference to Anglo-American legal thought shows that there is still much to be done in bringing together the two legal worlds which are more and more confronted with identical problems.

The third volume published by the Institut International de Philosophie du Droit et de Sociologie Juridique gives again a valuable contribution to some problems of legal theory, this time on the ends of law, discussed by prominent jurists of many countries at the Congress at Rome in 1937. The chief problem which emerges from the papers and discussions is whether Common Good, Justice and Security can all be pursued together or whether a choice has to be made between these ends. The advanced student of Jurisprudence will read the discussions with profit.

W. Friedmann.

RECENT THEORIES OF SOVEREIGNTY. By Hyman Ezra Cohen. The University of Chicago Press. (In England, The Cambridge University Press). ix + 169 pp. **13s. 6d.** net.

One of the most striking features of modern juristic and political thought is the general attack upon absolutism in relation to sovereignty. Inasmuch as this attack began before Einstein had published the fruits of his researches, it may be that lawyers can claim some little credit for originality. However that may be, little is now left of Austinian dogmatism, whether the approach be formalist (as with Kelsen) or sociological (as with Duguit and his successors). In this short monograph, Mr. Cohen sets out plainly and concisely the theories of some of the foremost of modern jurists and political theorists, in so far as they bear upon his problem. The choice is necessarily a little arbitrary—it includes Jellinek, Esmein, Duguit, Kelsen, the Vienna school, and Laski, but it omits Willoughby, Krabbe, Del Vecchio, and Stammler, and there are no doubt others who could well have been included. As always in juristic thought, the cardinal problem is that of selection, and it must be admitted that by limiting the

field of enquiry, the author has left a reasonably clear impression upon the reader's mind. Moreover, there is an excellent bibliography, for which students will be grateful. The conclusions are cautious. Mr. Cohen says (p. 139): "Apparently twentieth-century theory still has not gone beyond these ends of government; democracy, constitutionalism, and individualism persist throughout all formulations, like the purple thread in the Hebrew fringes. But the twentieth century has begun to show signs that even these may be the subject of the next attack." It undoubtedly has, both in Russian legal thought, and in the legal and political philosophy of the totalitarian states. As yet, no one can say what permanent mark these extremer manifestations will leave. Meanwhile, Mr. Cohen's book is a very useful stocktaking.

G. W. KEETON

CAUSES OF CRIME. Biological Theories in the United States, 1800–1915. By ARTHUR E. FINK, Department of Sociology, University of Pennsylvania. University of Pennsylvania Press. 1938. x + 309 pp. English price **14s.**

At the suggestion of Professor Thorsten Sellin, Philadelphia, the author has undertaken to give a comprehensive picture of American contribution to the biological study of crime from the very beginning of criminological research up to the first publications of William Healy, whom the author justly regards as the pioneer of an entirely new era. The scope of the book is thus somewhat narrower than its main title might indicate, but within these self-imposed limits it presents a very thorough and well-documented history of the treatment, in American criminology, of certain chiefly biological and psychiatric problems, as insanity and feeble-mindedness, "moral insanity," alcoholism, and the significance of the hereditarian factor in general. Entirely excluded from the author's review are therefore the social factors in the causation of crime, which have now come to occupy the place of honour in American research. The prevailing impression gained from the author's detailed narrative is that the biological aspects of crime have in the United States been subject to a discussion more extensive than original (the author's bibliography, exclusively devoted to publications by American writers, fills no less than fifty pages!). In a well-balanced concluding chapter the author aptly interprets the position by saying that "there was no one school, no one theory, of crime causation which was indigenous to America. This is not to say that there was a lack of theories, but rather that the abundance of theories was taken over from the European scene" (p. 244). And he finds the explanation in the fact that American culture in the nineteenth century had to deal with too many urgent practical problems to devote much original thought to what was then regarded as a mainly theoretical question. It was left to the twentieth century to realise that the practical tasks of penology cannot be efficiently solved without a deeper insight into the causation of crime.

To sum up: The author has done valuable spade work for the future historian of American criminology, and more than that, his book will be indispensable for everyone desirous to study the rôle of the biological school in general.

HERMANN MANNHEIM.

THE CRIMINALS WE DESERVE. By Henry T. F. Rhodes, of the Institute of Criminology, University of Lyons, and the International Academy of Criminology. Methuen, London. 1937. 257 pp. **7s. 6d.** net.

This is a book easy to read, but difficult to review owing to the extreme variety of the topics upon which it touches. Well written, never dull, and full of interesting detail, it is the work of a man who is apparently at home not only in the world of crime itself, but is equally conversant with the technique of crime detection and prevention. His main thesis —modern society mass-produces crime just as it mass-produces public opinion and motor cars—whilst not absolutely original, is certainly true, though in some respects the reader may be inclined to regard the author as somewhat over-pessimistic. The slums, which he justly brands as the chief breeding places of crime, are slowly disappearing, and education cannot simply be accused in this way as making matters worse, because "the capacity to appreciate and desire better conditions is instilled without there being adequate machinery to satisfy these desires." The problem how far education is of real value in preventing crime has troubled the expert from the beginnings of scientific criminology. A hundred years ago, Guerry and Fletcher already recognised that education *alone* cannot be expected to solve the problem; it is not as simple as Victor Hugo imagined: "for every school that is opened a prison can be closed." But *without* education there can certainly be no progress, and the difficulty narrows down to that of having the right type of education for the various types of people.

There are in the book a few more generalisations that should perhaps not be allowed to pass without some contradiction. Even the most fervent admirer of the great and incontrovertible contributions made by psychoanalysis to our knowledge of crime and its causes will be reluctant to subscribe to the statement that "probably 75 per cent of crimes of murder and violence are at least indirectly due" to the Oedipus complex (p. 3). This seems an exaggeration that can do only harm to a great scientific movement.

The author is at his best when he is dealing with such topics as the opium traffic, the "white slave traffic," the technique of forgery (to which he has devoted a separate book), etc.

Hermann Mannheim.

L'ÉVOLUTION DE LA JURISPRUDENCE FRANÇAISE EN MATIÈRE DE CONFLIT DES LOIS DEPUIS LE DÉBUT DU XXe SIÈCLE. By Jacques Donnedieu de Vabres. Sirey, 1938. 781 pp. **100 frs.**

In 1905, M. H. Donnedieu de Vabres, now Professor at the Sorbonne, published his thesis on *Évolution de la Jurisprudence Française en matière de conflit des lois*. He described the work done by the French courts during the nineteenth century to develop a modern system of private international law. M. Jacques Donnedieu de Vabres has now continued the thread where it was left more than thirty years ago. He has produced a highly interesting and important book, which no doubt does honour to the family tradition. Nevertheless, the non-French reviewer who has worked himself through the 767 pages, is left with curiously mixed feelings of admiration and dissatisfaction.

The book deals with every question of Private International Law which has ever come before the French courts or which is discussed in French theory. It describes in every connexion the development and trend of French court practice. The comparative lawyer is particularly grateful for the strong emphasis placed on, and the careful analysis of, decisions—a method which French textbooks more interested in the "*système*" so often neglect. The material thus presented to the reader is so enormous that the book is a textbook, based on court practice, rather than a monograph in the usual sense, and whoever desires to know how a particular question is treated in French practice can certainly employ it as a useful guide. To mention just one topic out of a vast number, attention might be drawn to the development of the principle of *locus regit actum*. In France the existence of the rule, though not laid down in the Code, is undoubted. But has it an imperative character or an optional one in the sense recently propounded by Cheshire (*Private International Law*, 2nd edition, pp. 244 *et seq.*)? The point arose especially in connexion with wills of foreigners, which were made in France, but which under the French rules of Private International Law were subject to the law of the testator's nationality. In the course of the nineteenth century many decisions of the Cour de Cassation as well as of Lower Courts had adopted the view that the rule *locus regit actum* had to be strictly observed. But a decisive reaction, well prepared by theoretical research, set in when on 20th July, 1909, the Cour de Cassation had to decide the case of *Viditz* v. *Gesling*. An English lady died in Paris leaving a will made in France in English form, but invalid according to French Law. The will was upheld, one of the *attendu* being that the rule *locus regit actum* "a été admise pour faciliter les actes accomplis soit pour les Français à l'étranger soit pour les étrangers en France, et elle n'a d'autre effet que d'accorder au testateur un droit d'option entre les formes admises par sa loi nationale et celles qui sont exigées par la loi du lieu où il se trouve." Soon afterwards the point arose concerning an American subject domiciled in France who had made a will in France in American form, which was invalid according to American Law, since this required the form prescribed by the law of the testator's domicile. In view of the *renvoi* the will was held invalid: *Sanchez* v. *Wallerstein*, Trib. Civ. Seine, 10th July, 1910, *Clunet*, 1911, 912. In a still later case *mutatis mutandis* identical facts made it necessary to consider the effect of the Wills Act, 1861, which is known not to allow the use of the English form as such. The will of the Englishman who was domiciled in France but had made an English will in France was—notwithstanding its invalidity under English Law—held to be valid on the ground that English Law "doit être entendue dans un sens large, conforme à l'esprit libéral du législateur anglais qui a manifestement voulu donner toutes facilités aux sujets anglais pour faire en tous lieux des dispositions testamentaires valables": *Cuez* v. *Ben Attar*, Cour d'Alger, 26th May, 1919, *Clunet*, 1920, 241.

All this makes interesting and stimulating reading. Whether the discussion of the general tendencies influencing French courts is equally fortunate, is a different matter. Although the period examined by the author covers less than forty years, he feels entitled and able to say that, while Private International Law during the nineteenth century was directed by the idea of the "personnalité du droit," produced by the democratic liberalism of the time, a renaissance of territorialism and a further progress of the power of the parties' autonomous intention is discernible.

The comparative lawyer can only note such statements. As far as he is concerned, the real value of the book does not lie in these parts, but in its detailed description of the law and its development.

It is with great regret that some real defects in the book must be mentioned. They are of a merely technical nature, but they make themselves grievously felt. The first part is devoted to a description of the methods employed by the Courts in making use of the traditional material such as Codes, theoretical research, customary law. The second describes the period from 1900 to 1918, the third that from 1918 to 1937. This somewhat arbitrary division into two periods of only eighteen years each involves both repetition and separation. Most problems are discussed twice, and as there are neither cross-references nor an index, this large, perhaps too large, volume loses much of the attraction which its learning and richness would seem to deserve.

F. A. Mann.

PARLIAMENTARY GOVERNMENT IN ENGLAND. By Harold J. Laski. London: George Allen & Unwin, Ltd. 1938. 453 pp. **12s. 6d.**

The author emphasises in his Preface that this is not a formal description of the working of parliamentary government in England, but that it is a commentary on "those aspects of its working which are most relevant to the pressing problems of our time." It is taken for granted that the reader knows the main outlines of our governmental institutions. The chief theme is expounded in Chapter I. It is to the effect that the English cabinet system of government has been successful so far because it has been backed by economic success; the period of expanding capitalism enabled the ruling class to make sufficient concessions to the ruled so that crisis could be avoided. Bagehot's proposition that the possessing class "must willingly concede every claim they can safely concede" gives the key to that phase. In the period of expansion there appeared to be no cleavage of opinion as to the basis of society. Lord Balfour's saying that "Our whole political machinery pre-supposes a people so fundamentally at one that they can safely afford to bicker" is essentially correct. "Since 1689, we have had, for all effective purposes, a single party in control of the State. It has been divided, no doubt, into two wings. It has differed within itself upon matters like the pace of change and the direction of change; it has never seriously differed upon the fundamental principles of change" (p. 93). We are now entering upon a phase in which the possessing class no longer feels that it can "safely" give further concessions. The Labour Party in working for the transformation of the economic basis of society cannot be fundamentally at one with its political opponents. If the presupposition of our political machinery no longer exists, or is seriously impaired, we certainly cannot bicker with safety. More specifically (p. 85 *seq.*), could a Labour Party victorious at the polls expect to be able to carry through their policy peacefully?

The reader who accepts the premisses will find a convincing commentary upon our political institutions. If the premisses are not accepted (and I presume that a Conservative must reject them or be converted from his Conservatism) that does not dispose of the book; most of the analysis of the present working of institutions, and particularly Chapter V on the Cabinet, is brilliant exposition that holds good whatever view is taken on

other matters. My only criticism is that Professor Laski might have given fuller documentation.

The handling of the introductory portion is open to some question. To those on the left the arguments are familiar; through countless books and discussions the left-winger comes to accept these views, and they then appear elementary and really self-evident. Would the man who has no such background find the summarised arguments satisfying? I doubt it, for (on the assumption that there are still minds open to conviction by rational political argument) he would be baulked by the severe condensation of what is necessarily a very large topic. Here again I think that lack of references is a pity. If argument must be condensed there is much to be said for telling the reader where he can pursue the matter further. For instance, part of Chapter I has been demonstrated at full length by the author in *The Rise of European Liberalism*, yet there is no reference to this. In Chapter VII on the Judiciary, where a great deal has to be said in a little space, there are adequate references for the doubting reader to satisfy himself, and the chapter definitely gains in weight by their inclusion.

Personally I have enjoyed this book immensely. It is an absolutely essential book for anyone who is interested in the realities of government.

R. M. Jackson.

THE BRITISH CABINET SYSTEM, 1830-1938. By Arthur Berriedale Keith, D.C.L., LL.D., D.Litt., F.B.A., *of the Inner Temple, Barrister-at-Law, and Advocate of the Scottish Bar; Regius Professor of Sanskrit and Comparative Philology and Lecturer on the Constitution of the British Empire at the University of Edinburgh.* London: Stevens & Sons, Ltd. 1939. 648 pp. **15s.** net.

We have learned to expect a full-sized book from Professor Berriedale Keith every six months, and here is one on the British Cabinet System. The purpose of the book is to show in detail how the Cabinet system works at the present day, to note the conditions of its successful functioning, and to describe the relations of the Cabinet to Parliament, the electorate, the party system and the Crown. It is one more monument to the author's industry, versatility and encyclopaedic knowledge, for which all serious students of constitutional law and government will be grateful. Dr. Jennings's *Cabinet Government* appears to be the only other book devoted to this subject that has been published in England, and it is not our intention to compare the general merits of the two works, for on such an important subject there is ample room for both. Professor Keith is the more dogmatic in drawing conclusions from precedents. Their difference of method is most striking when it comes to dealing with the Cabinet as a co-ordinating factor, Dr. Jennings effecting a synthesis between the Cabinet and the various branches of the administration, while Professor Keith is concerned rather to analyse the structure and functions of the several Government Departments. Among the half-dozen references to the earlier work, Professor Keith (p. 357) only once expressly disagrees with Dr. Jennings on a matter of constitutional principle, and we think that here he misses Dr. Jennings's point with regard to the exercise on certain occasions of "personal prerogatives."

The book opens with a good explanation of the nature of constitutional conventions. Other matters of special interest are the selection of the

Prime Minister and his position within the Cabinet; the increasing authority of the Cabinet in government; the doctrine of the mandate; the dissolution of Parliament; the creation of peers; and the King's sources of information from the Cabinet and elsewhere. We may mention more particularly the reasons for the choice of Mr. Baldwin as Prime Minister in 1923; the distinction between the selection of a peer as Prime Minister and a Prime Minister retaining that office after being created a peer; the apt remark that the right to a dissolution "is not a right to a series of dissolutions"; the magnification of the office of Prime Minister at the expense of the Cabinet, and non-discussion with the Cabinet in relation to the dissolution of Parliament; and the effect of the Parliament Act, 1911, on the prerogative power of creating peers.

The difficulties that confront the author of such a book, and the labour involved, are enormous. The Cabinet system rests mainly on political conventions which are often indefinite and have to be inferred by no certain criterion from innumerable precedents, which in their turn are partly veiled in secrecy. The materials include the *Letters of Queen Victoria*, the Greville *Memoirs*, the Esher *Journals*, the Fitzroy *Memoirs* (each in several volumes), and biographies or memoirs of the leading public figures of the nineteenth and twentieth centuries, in addition to Parliamentary debates and papers. Unfortunately Professor Keith does not provide us with a bibliography, so that the reader is occasionally met with such questions as whether the Greville *Journals* (p. 23, note (*h*)) are the series referred to elsewhere as Greville *Memoirs* or *Greville*, and has to guess the identity of the book called *Guedalla*.

It is a pity that the book should be interspersed with the author's personal judgments on the policy and conduct of public men, which in the guise of epithets insinuate themselves so frequently that there is no need for us to give examples. Permeating the book, too, is the author's violent disapproval of Mr. Neville Chamberlain's foreign policy. Criticism in a work of this kind is only scientific so long as it reveals departures from constitutional practice; and in so far as it is based in this respect on an alleged breach of the government's "mandate," it begs the question whether a doctrine of the mandate is in practice generally accepted. We should have thought that if any proposal called for a general election it was the Abdication. In any event, foreign policy is the question on which the electorate is least competent to decide. The last chapter consists of a diatribe against the Munich Agreement, but up-to-the-minute journalism is soonest out of date.

O. Hood Phillips.

AN OUTLINE OF CONSTITUTIONAL LAW. By W. I. R. Fraser, B.A., LL.B., *Advocate, Lecturer in Constitutional Law at the University of Glasgow*. Edinburgh: William Hodge & Co., Ltd. 1938. 228 pp. **10s.**

The main differences between Scottish and English constitutional law lie in the system of Courts, the organisation of local government, and the procedure in actions against the Crown. Chapters 12 and 13 of this book deal exclusively with the civil and criminal Courts of Scotland, and Chapters 14 and 15 exclusively with Scottish local government, which has recently been reorganised much on English lines. In the discussion on proceedings against the Crown (Chapter 10) and the relations between

the citizen and the State (Part VI), the principles of Scots law and English law are contrasted. The composition of Parliament and the Privy Council is related to Scottish history. An account is given of the central government departments dealing with Scotland, and of the recommendations of the Gilmour Committee set up in 1936 to advise on their reform. References are to Scottish cases wherever possible.

It is remarkable that Dykes and Philip's *Chapters in Constitutional Law* should be the only other book on constitutional law written from the point of view of the Scottish lawyer. Mr. Fraser's work supplements the English textbooks in those respects in which they are deficient. The framework is very elementary, but clear and concise. We should think that this book would be indispensable as an introduction for all students of law in Scotland. English students also will find much useful information on matters of which they are, but should not be, ignorant.

O. Hood Phillips.

A CONSTITUTIONAL HISTORY OF BRITISH GUIANA. By Sir Cecil Clementi. xxii + 546 pp. Macmillan & Co. **20s.** net.

Recent events have made this most complete monograph of first importance, for it is the belief of many that British Guiana will afford an outlet for the energies of a considerable number of refugees from Germany and Central Europe. There can be no question of the extent of its resources, or of its striking under-development. This volume, though a constitutional, and not a general history of the Colony, explains that under-development. From the first days of our acquisition of this Colony —as large as Great Britain—from the Dutch in 1803—it has suffered from a travesty of representative institutions, which vested political power in a tiny oligarchy of planters. If any advance in democratising these institutions were made, it involved the enfranchisement of a large majority of East Indians and Africans, illiterate and with no stake in the Colony. Accordingly, no substantial advance was ever made, and the Colony remained until 1928 in a constitutional *cul-de-sac*, in which misgovernment persisted and the Colony's resources remained undeveloped.

"The coastal interests dominated the administration, and, not unnaturally, the sugar planters and others whose interests were exclusively on the coast disapproved of spending the colonial revenues or private capital on objects which could not be expected to bring any immediate benefit to that coastal fringe, where all the sugar estates of the Colony are situated. Hence the roads and railways are coastal; and the chief works of the Colony, both public and private, have been drainage schemes and water-conservancy schemes for the benefit of the plantations and those who live on the coastal flats. Vast sums have been spent on defending the shore against the inroads of the sea. But any attempt to open up the interior has been looked at askance as likely to withdraw labour from the coast. There can, of course, be no doubt that the greatest asset of British Guiana at the present time is its sugar industry, and that a wise administration will safeguard that industry. Nevertheless it is also beyond doubt that, unless there is proper representation in the Colony's constitution for industries established in the interior, the back blocks of this 'magnificent province' will remain an unpeopled wilderness" (pp. 385–386).

In 1928 the old oligarchical constitution was abolished, and Crown Colony Government of the usual type was introduced, thereby restoring

confidence in the Colony's financial stability. The way is therefore open for a comprehensive development of the Colony, and it would be the height of folly if the opportunity were missed.

Sir Cecil Clementi has collected together all the available information upon the constitutional question, and none will dispute the accuracy of his diagnosis of the situation prior to 1928.

G. W. KEETON.

THE LAW OF NEGLIGENCE. By J. CHARLESWORTH, LL.D. Sweet & Maxwell Limited, 1938. **£2** net.

In the Preface to this work on *The Law of Negligence* we are told that "it was felt that instead of trying to bring Beven up to date . . . it would be better to make an entirely new book which could, moreover, be in one volume so as to be more convenient for practitioners."

If this means that Charlesworth on Negligence is offered as a substitute for Beven on Negligence (and the two works come from the same publishing house) let it be said at once that it is an inadequate substitute. The work of Dr. Charlesworth has naturally the advantage that it contains all the cases decided down to the beginning of 1938. In all other respects Beven (more particularly if one compares the third edition) is on a different plane of legal learning and analysis and authority. To take an example, the topic of Degrees of Negligence, which occupies some 24 pages in Beven, is handled by Dr. Charlesworth in a single paragraph (p. 5). One may perhaps also point to the rather summary treatment (at p. 8) of the relation between negligence and breach of statutory duty.[1] The adjustment of the doctrines of Common Law negligence and breach of statutory duty has, from the beginnings of modern statutory change, caused a certain malaise among Common Law judges and lawyers and may prove to be a matter of some social and even political importance if (as some observers think, such as Charles Bastide of the Ecole des Sciences Politiques et Economiques in his book *L'Angleterre Nouvelle*) one effect of our modern statutes is to create a differentiation between two classes of citizens, one the independent and fully responsible citizen, the *liber et legalis homo* of the older Common Law; and the other a dependent and less responsible citizen, the insured or insurable person of the modern statutes. One may perhaps detect the conflict of the two citizens and of the two philosophies in some of the earlier cases, like *Yarmouth* v. *France*, 19 Q.B.D. 647–650, and *Smith* v. *Baker*, [1891] A.C. 325, and in the hesitations of the law and of the decisions and dicta of the judges[2] in such more recent cases as *Flower* v. *Ebbw Vale*, [1936] A.C. 206, 214, 215; *Bailey* v. *Geddes*, [1938] 1 K.B. 156; *Chisholm* v. L.P.T.B., [1939] 1 K.B. 426; *Murray* v. *Schwachman*, [1938] 1 K.B. 130; *Lewis* v. *Denye* (1939), 55 T.L.R. 391; see especially the judgment of Lord Justice du Parcq and cases cited.

In brief, the work of Dr. Charlesworth is little more and does not pretend to be much more than a handy summary of decided cases intended for the use of the busy practitioner. And in this role it is a most useful and, on the whole, in the parts in which one has had occasion or opportunity to test it, as accurate a statement as may be of a rapidly developing department of the law.

The style is clear, though there are some traces of haste in the writing;

[1] There is a more detailed examination of this topic at pp. 338–343.
[2] Some of these matters are dealt with in Charlesworth at pp. 416–421.

the proof reading is well done, though a few errors have gone undetected (e.g. at p. 14, line (1) the word "builder" should presumably read "mortgagee"); and one finds here and there what appears to be an inaccurate statement of the law. Thus, *Hummerstone* v. *Leary* is not an authority for the whole of the proposition for which it is cited at p. 89. A Divisional Court has held (in an unreported case) that so long as he does not dismiss the action against one of two defendants at the close of the plaintiff's case, a County Court judge is entitled to say that he does not wish to hear evidence on the part of that defendant and proceed to hear the evidence of the other defendant, and on such evidence to decide the issue (*ex mea relatione*). Again, the statement of law in relation to owners of land for the fall of trees (p. 124) will need to be reconsidered in the light of the decision of the Court of Appeal in *Shirwell* v. *Hackwood*, [1938] 2 A.E.R. 1, which is cited in a footnote.[3] Further, it is conceived that the distinction between *Haynes* v. *Harwood* and *Cutler* v. *United Dairies* is not accurately stated at p. 459, though it is hinted at in the citation from Maugham, L.J. (as he then was) which is given on the same page. These cases (it is submitted) illustrate the scale of values that the Common Law observes and the greater liberty of action that it allows when life is in danger.

Other instances might be given of debatable propositions of law which are advanced in this volume. It would be unfair, however, to demand absolute accuracy of legal statement in a work which endeavours to compress the whole law of negligence into the compass of some 500 pages. It is necessary to be concise and, in certain cases, to be dogmatic on points that are more or less open to dispute. Suffice it to say that, taking it all in all, this is a valuable work for those for whom it is intended, for the advanced student and for the busy practitioner who wants a book of ready reference to the decided cases in this branch of the law.

RICHARD O'SULLIVAN.

A DIGEST OF ENGLISH LAW. By EDWARD JENKS (Editor), the late W. M. GELDART, R. W. LEE, SIR WILLIAM HOLDSWORTH, SIR JOHN C. MILES, WILLIAM LATEY. Third Edition. 2 vols. cclx vii—1258 — 120 pp. London: Butterworth & Co., 1938. **70s.**

In 1902 the suggestion was made by the Internationale Vereinigung für vergleichende Rechtswissenschaft of Berlin that a leading English legal scholar should write a book on English law in which the elements of those of its parts which are usually treated in the continental countries in the "code civil" should be stated in the system and as far as possible in the form of a Continental Code. It is the merit of Professor Jenks to have taken up that suggestion, and the present work, in which together with him a team of scholars took part whose eminence appears from their mere names, is the result. Of its success there can be no doubt: besides three English issues the book has appeared in two French editions and on its first 700 sections a German commentary has been published, covering —with German thoroughness—not less than 2000 very closely printed pages. Its main users are probably foreign members of the profession who desire quick and reliable information on elementary points of English law and who will no doubt find this task made much easier by the present work which approximates the sort of law book to which they are

[3] See the examination of this decision by C. J. Hamson in *Modern Law Review*, Vol. II. pp. 215–221.

accustomed. But the frequency with which the former editions, both English and foreign, are quoted also in comparative monographs and ordinary textbooks shows that continental scholars, too, have availed themselves of this easily accessible source of information. That the new edition, which is largely completely rewritten and embodies already the Matrimonial Causes Act, 1937, will find equal favour is undoubted.

The system of the book is that of the German Civil Code This has unfortunately led to the omission of some subjects which could not be dealt with in that code because they constitute peculiarities of English law. A few sentences on the fundamental distinction of common law and equity might have been useful, and a section on the main rules of interpretation of statutes and documents would have been a boon to many users. On several occasions the system is not strictly adhered to, and this has sometimes led to repetition and sometimes to a misplacement of rules which may cause some confusion. The sections on "Agency" in the general part and "Master and Servant" in the second are an example: most continental lawyers will find that the short sections on the liability of a master for the torts of his servants in the chapter on agency (Nos. 149 and 150) are superfluous, but they will probably search in that chapter for the rules on the determination of authority and will note with surprise that they are partly to be found here and partly in the chapter on Master and Servant. Some readers might perhaps be misled into believing that only the rules in the former chapter refer to "représentation" or "Vertretung," while those in the latter concern the "mandat" or "Innerverhältnis" solely. Again few continental readers will turn to the "law of property" for some of the rules on assignment of debts and it is not impossible that many of them will overlook s. 1676 which reports the rule of s. 25, Judicature Act, 1873 (now s. 136 (1), Law of Property Act, 1925), especially after having been informed by s. 329 under the heading "Assignment of Contract" that "except when the law provides otherwise in special cases, an assignment of a right arising out of a contract may be effected by mere agreement between assignor and assignee." It is true that the rule of s. 25 does not properly fit into the law of obligations as it covers choses in action generally. It should, however, have found its place in the general part of the book whose scantiness the learned editor himself deplores.

That a book of this character can only bring a judicious selection from the vast material of English case law and statutes is self-understood. It is equally self-understood that not every critic can possibly agree with every detail of the selection made. The present writer has been surprised to miss in the title on limitation of actions a reference to s. 19, 4 Anne, c. 16 (defendant beyond the seas). Here and there either a greater strictness in terminology or an open avowal and explanation of necessary duplicity might have been advisable: the word " condition," for example, is in the same chapter used sometimes in the sense of the Roman *conditio* (s.120,125), and sometimes in the sense of a term of agreement (ss.122,126 127), while in the chapter on sale of goods it is employed in a third meaning, i.e. as opposed to a mere warranty. It is submitted that the distinction between condition and warranty ought to be found in the general part of the law of obligations, not in the chapter on sale of goods.

Some of the rules as stated appear somewhat too broadly drafted, a fate which probably befalls every, but the bulkiest, textbooks; similarly a few *lapsus* are inevitable: among the more regrettable ones may be

mentioned that fraud is missing among the grounds on which an agreement may be avoided (s. 89), although its definition is found in its proper place (s. 92) and that the rule in *Carter* v. *Silber*, [1892] 2 Ch. 278, is erroneously restricted to liabilities of a minor incurred since majority (s. 54).

These little blemishes do not, however, detract from the merits of this great work. It would indeed be difficult to recommend to foreign lawyers a better guide through the maze of English law than this Digest. But other readers than these, too, might find it useful to study English law in a different garb: the present writer has to confess that few things have more strongly convinced him of the logical impossibility of the rule in *Donoghue* v. *Stevenson* than a perusal of Sir John Miles' succinct restatement, which makes it plain that the supposed duty to take care is nothing but a fiction invented solely to form the basis of a new tort which itself constitutes the sole legal consequence of the supposed duty. It may look like a slip, but it is in reality a frank admission of this logical impossibility that Sir John summarises the rules enumerating the cases in which such duties are supposed to exist under the obviously inappropriate heading "Standard of diligence."

ERNST J. COHN.

THE LAW RELATING TO COMPETITIVE TRADING. By D. KNIGHT DIX. Sweet & Maxwell, Ltd. 1938. xx + 224 pp. **15s.**

The world suffers to-day from too many books, very often the product of too little thought. It is a pleasant duty, therefore, to welcome a new book which has a real contribution to make. Miss Dix would not claim that her book makes any addition to existing knowledge, but it is the first attempt in England to present the law relating to business competition as a comprehensive whole.[1] The book is divided into four parts: Part I, Trade Interference, which deals with Intimidation and Conspiracy; Part II, Price Maintenance; Part III, Competition at the Hands of Former Employees, where the author deals with agreements in restraint of trade; and Part IV, Detriment to Goods and Trade Reputation, i.e. what may be described as "trade defamation" and passing-off.

In her Introduction the author at once provokes and disarms criticism by citing with approval a dictum of Viscount Finlay that it is not for any tribunal to adjudicate as between conflicting theories of political economy and adopting this artificial detachment for herself as a textbook writer. It is now trite learning that the judicial process involves a selection between competing principles, which is governed to a greater or lesser degree by the conscious or unconscious predilections of the judge in matters of social policy. And in no field is this fact more easily demonstrable than in the case law dealing with trade relations. The subject is essentially economic in character and the opinions of the judges are necessarily conditioned usually consciously, sometimes, perhaps unconsciously, by their view of public policy. Thus the Courts are constantly being asked to decide whether a restraint is reasonable in the interests of the public—a decision which inevitably involves the weighing of economic and social policies. No one, for example, can read the judgments of Lord Parker

[1] Though, elsewhere, I have attempted an outline of the subject in this country and the U.S.A., *Journal of Comparative Legislation*, Vol. xix, Part 1, pp. 38 *et seq.*: Vol. xx, Part 1, pp. 29 *et seq.*

in *Att. Gen. for Australia* v. *Adelaide S.S. Co.* or in *N.W. Salt Co. Ltd.* v. *Electrolytic Co. Ltd.* or of Lord Haldane in the latter case without being aware of this. More notoriously the confusion and contradictions of the conspiracy cases are a reflection of the differing social views of the judges concerned in them. In America and in Australia the nature of the problem has been recognised by setting up commissions consisting of lawyers, economists and businessmen to decide questions of unfair competition and trade restriction. In so far as the American legislation has proved unsatisfactory this is due almost entirely to the way in which the courts have approached the task of construing the statutes. The decisions betray a lack of guiding principle and a failure to appraise the economic significance of the problems that arise. To impute Olympian detachment to the judge, then, is a source of error and confusion, and it is equally unwise for the text-writer or legal adviser to ignore the factors at work behind the printed word. The most vital and the most difficult task of the legal adviser is to prophesy what the courts will do; the discharge of this duty involves a searching understanding of the forces which shape the development of the law.

Thus the author of this book has imposed upon herself a limitation which necessarily detracts from its value as a contribution to academic thought and diminishes its value even to the practitioner. In the result it is no more than a catalogue of a large number of decided cases and relevant statutory provisions. This work of listing and exposition has been done with care and ability, and Miss Dix is to be congratulated on the industry with which she has abstracted all the relevant material. More valuable than anything else is the information—hitherto not easily accessible—she has collected as to the price maintenance agreements of certain important trade associations, notably, the Tobacco Trade Association, the Proprietary Articles Trade Association, and the Motor Trade Association.

One or two points of detailed criticism may also be ventured. *South Wales Miners Federation* v. *Glamorgan Coal Co.* should be cited as, together with *Quinn* v. *Leathem*, setting the seal of the approval of the House of Lords on *Lumley* v. *Gye* and *Bowen* v. *Hall* (p. 58). In the same section, Interference with Contractual Relations, Prof. Lauterpacht's article in *Law Quarterly Review*, 1936, page 494, should be referred to and the question of justification should be more fully discussed. The *Taff Vale Case* is also too briefly disposed of and no mention is made of the difficulties to which it may still give rise notwithstanding its partial repeal. A short paragraph does not exhaust the possibilities of the Trades Disputes Act, 1927. Pollock's doubts as to "the magic of plurality" are noted at page 81, and it would have been interesting to cite in that connection the decision in *Northern Securities Ltd.* v. *U.S.*, 193 U.S. 197 (Holmes, J., diss.) that a combination by way of fusion comes under the ban of the Sherman Act, and to point out that the *Standard Oil Case* concerned a fusion of undertakings into one corporation. In the short discussion on *Dunlop* v. *Selfridge* a few speculations on the Sixth Interim Report of the Law Revision Committee would have been profitable.

E. WYNDHAM WHITE.

CONSIDERATION IN THE LAW OF SIMPLE CONTRACT, being the Lee Essay Prize of Gray's Inn for 1938. By J. WICKS. London: Stevens & Sons, Ltd. 1939. xi + 78 pp. **5s.**

THE LAW RELATING TO UNINCORPORATED ASSOCIATIONS, being the Yorke Prize Essay for 1937. By D. Lloyd. London: Sweet & Maxwell, Ltd. 1938. xvi + 248 pp. **21s.**

In the preface to *Land in Fetters*, Lord Justice Scrutton said: "These pages bear the additional stigma of being a Prize Essay, and it is a commonplace of criticism that from that source no good thing can come." The trouble is that though the essay may deserve the prize, it does not follow that it should be published, and Mr. Wicks' essay is a case in point. On the historical side, it contains nothing which cannot be found in Ames, Pollock and Maitland, and Holdsworth, and it is not convincing either in the use of Year Book materials or in the way in which the complicated history of assumpsit is expounded. Mr. Wicks is more original but less sound in the chapter in which he criticises the recommendations of the Law Revision Committee about consideration. For instance, his remarks on p. 59 ignore the existence of cases such as *Webster* v. *Cecil*, and on p. 66, his discussion of the suggestion that "a promise made in consideration of the promisee performing an act shall be enforceable as soon as the promisee has entered upon the performance of the act," is based on a misunderstanding of the agency cases like *Trollope* v. *Martyn*. The book is carelessly edited, and one cannot agree with Mr. Grant-Bailey who says in the foreword that it "is invaluable to the practitioner."

On the other hand, Mr. Lloyd's essay on Unincorporated Associations is a work of real utility. It is obvious that he has a first-hand knowledge of the authorities on his subject, and he has presented his material in a most interesting form. He begins with a discussion of legal personality, and he has obviously been very much influenced by the number of associations to which English law has granted recognition falling short of corporate status. He comes to the conclusion that there is "no reason why there should not be varying degrees of personality which can be conceded to each particular association or class of association, according to the exigencies of the particular case." He goes on to describe the various types of unincorporated associations, and the section on trade unions can be warmly recommended. His description of the attitude of American courts to trade unions is misleading, for though he mentions the fact that the Anti-Trust laws have been invoked against combinations of workmen, he gives no hint of the protracted struggle, illustrated by cases like *Truax* v. *Corrigan*, to outlaw the injunction in labour cases—a struggle which has recently culminated in the passing of the Norris-La Guardia Act. He deals at length with the creation of unincorporated associations and their liability in contract and tort. There is a good explanation of how the trust has been utilised to enable such associations to hold property, and the difficulty caused by the rule that the beneficiaries of a trust must be ascertained is squarely met. The chapter on Conflict of Laws is excellent, though we must point out that the decision of the Supreme Court of the United States in *Great Southern Fire Proof Hotel* v. *Jones*, reported, by the way in 177 and not 117 U.S., was mainly determined by constitutional considerations—the desire to restrict the diversity jurisdiction of the federal courts and the tendency to follow the construction put upon a State statute by the highest tribunal of that State. The Yorke Prize Essays have on many occasions in the past enriched our legal literature, and Mr. Lloyd's book worthily maintains this high tradition.

D. W. Logan.

MARINE POLICIES. By W. H. Eldridge. Third edition by HARRY ATKINS. Pp. xlviii, 291, and 20. London: Butterworth & Co. (Publishers) Ltd. **30s.** net.

Considering the importance of the law of marine insurance the absence of good text-books is remarkable. After the classic work of Arnould this volume is perhaps the best; though the notes by Chalmers to his edition of the Marine Insurance Act, 1906, are so good that many practitioners find them sufficient for their daily needs. Eldridge, despite a few references to Grotius, Puffendorf and others, is not a scholarly book. It makes no attempt to expound and discuss the principles on which marine insurance is based. It does, however, contain a great deal of information lucidly set out, more or less in conformity with the scheme of the Act itself, and the principles are there for anybody who has had some preliminary training in the subject to discover, so to speak, in operation, for himself.

The present edition is a somewhat ill-balanced performance. While the recent cases have been noted up, several of the most important of them are not discussed, but receive a mere citation (cf. *Glen Line Ltd.* v. *A.-G.* (1930), 36 Com. Cas. 1). Again certain topics of great interest on which light has been shed is recent cases such as that of constructive total loss of freight (as to which see *Carras* v. *London and Scottish Assurance Corporation Ltd.*, [1936] 1 K.B. 291, and *Kulukundis* v. *Norwich Union Fire Insurance Society Ltd.*, (1936), 52 T.L.R. 591) are left much as they were in the past, the editor appearing to be oblivious of the developments.

One of the most useful features of this book is that it not only gives in an appendix a well-chosen selection of the Institute clauses, but that it contains in the text a critical discussion of a number of the most important of them. Here again, however, the work is ill-balanced, for while several of the clauses relating to hulls are considered at some length, the cargo clauses are almost ignored, some being mentioned without exposition in footnotes, others, as far as we have been able to find not being referred to at all. Considering the vital importance played by the Institute Clauses in modern marine insurance the time has come for a thorough and systematic discussion of them.

R. S. T. CHORLEY.

GATLEY, **ON LIBEL AND SLANDER** (O'Sullivan).

HUGHES, **THE LAW RELATING TO ROAD USERS' RIGHTS, LIABILITIES AND INSURANCE.**

Cf. pp. 335, 356 above.

The above-mentioned books are published by Messrs. Stevens & Sons with Messrs. Sweet & Maxwell. The price of Gatley is **63s.**, not as indicated **52s. 6d.**

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